FILED
MAR 5 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1256

MAXWELL DARKS
Petitioner,

VERSUS

TRANSOK PIPE LINE COMPANY,
an Oklahoma Corporation, and
THOMAS S. KLEPPE, Secretary of Interior,
The United States Department of Interior,
Respondents.

and

MAXWELL DARKS and LES STARKS, d/b/a
GREASY CREEK CATTLE COMPANY,
Petitioners,

VERSUS

TRANSOK PIPE LINE COMPANY,
an Oklahoma Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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March, 1976

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TABLE OF CONTENTS

	PAGE
Orders and Pleadings Below	2
Grounds on Which Jurisdiction of the Court is Invoked	6
Questions Presented for Review	6
Constitutional Provisions, and Statutes Involved in These Cases	7
Statement of Case	9
When Federal Questions Were Raised	18
Reasons for Granting the Writ	21
Explanation	30
Argument	31

Certificate of Service follows Appendix.

APPENDICES

Appendix A:

Amended Petition in the District Court of Hughes County (No. C-74-250), filed Mar. 3, 1975	1-3
Amended Petition in the District Court of Hughes County (No. C-74-251), filed Mar. 3, 1975	4-6
Order Granting Writs of Prohibition to Petitioner Transok Pipe Line Company against Respondent Judge Seay of the District Court of Hughes County, Oklahoma, prohibiting further proceedings in Causes No. C-74-250 and No. C-74-251	7-8
Orders Denying Oral Argument and rehearing in both causes	9

TABLE OF CONTENTS CONTINUED PAGE

Appendix B:

Order by Corporation Commission of Oklahoma granting a Certificate of Condemnation for the underground storage of natural gas in the Channel Booch Formation underlying the area of Petitioner herein (Maxwell Darks and other landowners) to Transok Pipe Line Company (No. 96291) in Case No. 35868 9-14

Order Denying Application and Motion to Vacate Commission Order No. 96291 in Case No. 35868 15-17

Appendix C:

Order of Supreme Court of Oklahoma denying Application to Assume Original Jurisdiction and for Writ of Prohibition in Case No. 46719. Dated July 31, 1973 17

Appendix D:

Exceptions to Report of Commissioners in state court condemnation Case No. 73-93 filed July 3, 1973 18-26

Amended Exception to Report of Appraisers, filed Sept. 5, 1973 26-27

Exhibit "A"—Letter from Transok Pipe Line Company to Fred Daugherty, Judge, U. S. District Court, dated Aug. 1, 1973 28-30

Exhibit "B"—Letter from Carl Michael Smith, attorney for Maxwell Darks, to Fred Daugherty, Judge, U.S. District Court, dated Aug. 7, 1973 30-31

Temporary Restraining Order against Maxwell Darks, issued by District Court of Hughes County, Oklahoma, in No. 73-93 dated Oct. 31, 1974 32-33

BLEED THROUGH

TABLE OF CONTENTS CONTINUED PAGE

Affidavit filed in District Court of Hughes County, Oklahoma, by Maxwell Darks acknowledging receipt of letter from Transok Pipe Line Company to Maxwell Darks, in No. 73-93 filed Dec. 17, 1974 33-35

A final order by District Court of Hughes County, Oklahoma, regarding Hubert Douglas, Maxwell Darks, et al., as participants in this condemnation cause No. 73-93, filed Nov. 22, 1974 35-37

Appendix E:

Order by U. S. Court of Appeals, 10th Cir., denying Petition for Writ of Prohibition in Case No. 75-1587, Aug. 15, 1975 38

Appendix F:

Exception to Commissioner's Report, filed in U. S. District Court, Eastern District of Oklahoma, in Case No. 73-186-C, Oct. 26, 1973 39-44

Order overruling Exception to Commissioner's Report by U. S. District Court, Eastern District of Oklahoma, Case No. 73-186-C, filed Nov. 16, 1973 44-45

Order granting plaintiff's Motion for New Trial, in U. S. District Court, Eastern District of Oklahoma, Case No. 73-186-C, filed Dec. 31, 1975 46-55

Appendix G:

Letter from U. S. Department of Interior (Geological Survey) to Maxwell Darks 56-57

Letter from U. S. Department of Interior (Bureau of Indian Affairs) to Maxwell Darks, dated Jan. 21, 1976 57

TABLE OF CONTENTS CONTINUED

PAGE

Appendix H:

United States Constitution:

Amendment V ... 58

Amendment XIV ... 58

15 U.S.C. 717f(c), f(h) ... 59

Oklahoma Constitution:

Article 2, Bill of Rights ... 62

Article 7, Courts in General ... 64

Article 9, Corporation Commission ... 65

52 O.S., Gas Companies and Pipe Lines—Underground Storage of Gas ... 72

66 O.S., Railroads ... 77

12 O.S., Civil Procedure ... 80

23 O.S., Damages ... 86

60 O.S., Estates in Real Property ... 87

25 U.S.C., Indians ... 87

Act of May 27, 1908 (35 Stat. 312) ... 89

Act of August 4, 1947 (61 Stat. 732) ... 91

Federal Rules of Civil Procedure ... 93

TABLE OF AUTHORITIES

CASES:

Amerada Petroleum Company v. Federal Power Commission, 334 F.2d 404, 379 U.S. 683, 85 S.Ct. 832 (1965) ... 25

Cities Service Gas Co. v. Heubner, 197 P.2d 985 (1948) ... 16

Consumers Power Company v. Allegan State Bank, 174 N.W.2d 578 ... 27

BLEED THROUGH

AUTHORITIES CONTINUED — PAGE

County Commissioners of Creek County v. Casteel, 522 P.2d 608 (1974) 19, 20, 22, 23

Delhi Gas Pipe Line Co. v. Swanson, 520 P.2d 670 (1960) 16

Emeny v. U. S., 412 F.2d 1319 (1969) 27

Ferguson v. Ill. C. R. Co., 210 N.W. 604 26

Gilbertson v. Gilbertson, 489 P.2d 1381 26

Graham v. City of Duncan, 354 P.2d 458 (1960) 16

Kelly, et al. v. Oklahoma Turnpike Authority, 269 P.2d 359 (1954) 22

La Bellman v. Gleason and Saunders, Inc., 418 P.2d 949 26

La Vaca Gathering Company v. Federal Power Commission, 379 U.S. 574, 85 S.Ct. 486 25

Missouri Pacific Railway Company v. Nebraska, 164 U.S. 403, 41 L.Ed. 489 26

Oklahoma City v. Wells, 91 P.2d 1077 (1939) 16

Scott v. Danahar, 343 F.Supp. 1272 (1964) 24

Town of Ames v. Wybrant, 220 P.2d 693 (1950) 24

Trunkline Gas Company, 24 F.P.C. 1020, Opinion 320, reh. den. 25 F.P.C. 158 (1960) 25

U. S. v. Merz, 376 U.S. 192, 84 S.Ct. 639 (1964) 17, 29

U. S. v. Oklahoma Gas and Electric Company, 127 F.2d 349, aff'd 318 U.S. 206, 63 S.Ct. 534 13

CONSTITUTIONAL PROVISIONS:

United States Constitution:

Amendment V 7, 19, 20, 30, 31

Amendment XIV 7, 14, 19, 20, 30, 31

Oklahoma Constitution:

Article 2, § 6 ..... 7, 24

Article 2, § 7 ..... 7, 24

AUTHORITIES CONTINUED — PAGE

Article 2, § 23 ..... 7, 26
Article 2, § 24 ..... 7, 13, 21, 22, 23
Article 2, § 32 ..... 7, 26

Article 7, § 1 ..... 7, 14, 15, 16, 26
Article 7, § 2 ..... 7, 14, 15, 16

Article 9, § 15 ..... 7, 26
Article 9, § 16 ..... 7, 26
Article 9, § 18 ..... 7, 26
Article 9, § 19 ..... 7, 26
Article 9, § 20 ..... 7, 14, 26

STATUTES:

15 United States Code:
§ 717f (c), (h) 14, 24

25 United States Code:
§ 357 ..... 8, 11, 28
§ 415(a) 8, 28, 30

Act of May 27, 1908 (35 Stat. 312):
§ 1 ..... 6, 8, 26, 31
§ 6 ..... 8, 12

Act of August 4, 1947 (61 Stat. 732):
§ 1 ..... 9, 28, 30
§ 4 ..... 9, 12
§ 11 ..... 9, 12

12 Oklahoma Statutes:
§ 3 ..... 8, 19
§ 4 ..... 8, 19
§ 5 ..... 8, 19
§ 95(3) 8, 24
§ 952 ..... 8, 10
§ 990 ..... 8, 10
§ 993 ..... 8, 10
§ 1038 ..... 8, 26

BLEED THROUGH

AUTHORITIES CONTINUED PAGE

§ 1382 ..... 8, 13, 22, 32
§ 1383 ..... 8, 13, 22, 32
§ 1384 ..... 8, 13, 22, 32

23 Oklahoma Statutes:

§ 9 ..... 8, 24
§ 68 ..... 8, 24

52 Oklahoma Statutes:

§ 36.1 ..... 6, 7, 10, 24, 26, 31
§ 36.2 ..... 6, 7, 10, 24, 26, 31
§ 36.3 ..... 6, 7, 10, 24, 26, 27, 31
§ 36.3(b) 25
§ 36.4 ..... 6, 8, 9, 10, 12, 24, 26, 31
§ 36.4(b) 25
§ 36.5 ..... 6, 8, 10, 12, 24, 26, 31, 32
§ 36.6 ..... 6, 8, 10, 24, 26, 29, 31, 33
§ 36.7 ..... 6, 8, 10, 24, 26, 31

60 Oklahoma Statutes:

§ 64 ..... 8, 27

66 Oklahoma Statutes:

§ 53 ..... 6, 8, 10, 13, 14, 21, 23, 26, 27, 28, 31
§ 54 ..... 6, 8, 10, 21, 22, 26, 28, 31
§ 55 ..... 6, 8, 10, 26, 28, 31

RULES:

Federal Rules of Civil Procedure:

Rule 4(d)(5) 9, 12
Rule 19(a)(b)(3) 9, 11
Rule 21 ..... 9, 11

REFERENCES:

54 A.L.R. § 1 26

Kuntz, Oil and Gas, § 38.2(4) 27

Semple, Oklahoma Indian Land Titles

In the

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MAXWELL DARKS,
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VERSUS

TRANSOK PIPE LINE COMPANY,
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THOMAS S. KLEPPE, Secretary of Interior,
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and

MAXWELL DARKS and LES STARKS, d b a
GREASY CREEK CATTLE COMPANY,
Petitioners,

VERSUS

TRANSOK PIPE LINE COMPANY,
an Oklahoma Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Petitioners pray a writ of certiorari issue to review the unreported final orders of the Supreme Court of Oklahoma of September 8, 1975, with orders denying rehearing on December 9, 1975, in two companion cases both styled Transok Pipe Line Company vs. Frank Seay, the Honor-

able Judge of the 22nd Judicial District, County of Hughes, State of Oklahoma, No. 73-250 (T.C.) 48,708 (S.Ct.) and No. 73-251 (T.C.) 38709 (S.Ct.).

ORDERS AND PLEADINGS BELOW

(1) Amended Petition filed in the District Court of Hughes County, State of Oklahoma, on March 3, 1975, in case styled Maxwell Darks vs. Transok Pipe Line Company, No. 74-250 (T.C.) (App. A, p. 1).

(2) Amended Petition filed in the District Court of Hughes County, State of Oklahoma, on March 3, 1975, in case styled Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company vs. Transok Pipe Line Company, No. 74-251 (T.C.), (App. A, p. 4).

(3) Unpublished and unreported Final Order of the Supreme Court of Oklahoma granting Writs of Prohibition on September 8, 1975, in two companion cases No. 74-250 (T.C.), 48708 (S.Ct.) and No. 74-251 (T.C.), 48709 (S.Ct.), both styled Transok Pipe Line Company vs. Frank Seay, the Honorable Judge of the 22nd Judicial District, County of Hughes, State of Oklahoma, and styled in the District Court of Hughes County, State of Oklahoma, as (1) Maxwell Darks vs. Transok Pipe Line Company, No. 74-250 (T.C.), 48708 (S.Ct.) and (2) Maxwell Darks and Les Starks, d b/a Greasy Creek Cattle Company vs. Transok Pipe Line Company, No. 74-251 (T.C.) 48709 (S.Ct.), (App. A, p. 7).

(4) Order of the Supreme Court of Oklahoma of December 9, 1975, denying oral argument and rehearing in

BLEED THROUGH

case styled Transok Pipe Line Company vs. Frank Seay, the Honorable Judge of the 22nd Judicial District, County of Hughes, State of Oklahoma, No. 74-250 (T.C.), 48708 (S.Ct.), (App. A, p. 8).

(5) Order of the Supreme Court of Oklahoma of December 9, 1975, denying oral argument and rehearing in case styled Transok Pipe Line Co. vs. Frank Seay, the Honorable Judge of the 22nd Judicial District, County of Hughes, State of Oklahoma, No. 74-251 (T.C.), 48709 (S. Ct.), (App. A, p. 8).

(6) Unreported Order-Certificate of the Corporation Commission of Oklahoma in Case No. 35868, of March 5, 1973, Order No. 96291, in case styled Application of Transok Pipe Line Company pursuant to 52 O.S. § 36.1 *et seq.* for Certificate, et al. (App. B, p. 9).

(7) Unreported Order of the Corporation Commission of Oklahoma No. 98837 in Case No. 35868, dated July 23, 1973, styled as set out in (6), a related order (App. B, p. 15).

(8) Unreported Order of the Supreme Court of Oklahoma denying application for Writ of Prohibition styled Maxwell Darks vs. Corporation Commission of Oklahoma, et al., Case No. 46719, dated July 31, 1973 (App. C, p. 17).

(9) Exceptions to Commissioners Report filed in the District Court of Hughes County, State of Oklahoma, in Case No. 73-93 (T.C.), 48054 (S.Ct.), omitting Exhibits attached thereto, in case styled Transok Pipe Line Company vs. Hubert Douglas, Jr., Maxwell Darks, et al., pleading filed on July 3, 1973 (App. D, p. 18).

(10) Amended Exceptions to Report of Commissioners filed in the Hughes County District Court, in case No. 73-93 (T.C.), 48054 (S.Ct.), including Exhibits "A" and "B" attached thereto, filed on September 5, 1973, in case described in (9) above, a related pleading (App. D, p. 26).

(11) Unreported Temporary Restraining Order filed in the Hughes County District Court, State of Oklahoma in case No. 73-93 (T.C.), 48054 (S.Ct.) described in (9) above, filed on October 31, 1974 (App. D, p. 32).

(12) Affidavit pleading filed in the Hughes County District Court, State of Oklahoma, in case No. 73-93 (T.C.), 48054 (S.Ct.) in case described in (9) above, filed on December 17, 1974 (App. D, p. 34).

(13) Unreported Order in the Hughes County District Court, State of Oklahoma, on November 21, 1974, No. 73-93 (T.C.), 48054 (S.Ct.), consolidated for purposes of appeal and now pending before the Supreme Court of Oklahoma with companion cases styled Transok Pipe Line Company vs. Hubert Douglas, Jr., Maxwell Darks, et al. in the trial court (App. D, p. 35).

(14) Unreported Order of the United States Court of Appeals, 10th Circuit, No. 75-1587, styled Maxwell Darks vs. Honorable Joseph W. Morris, Judge of the United States District Court for the Eastern District of Oklahoma, denying Writ of Prohibition in case No. 73-186-C, order dated August 15, 1975 (App. E, p. 38).

(15) Exceptions to Commissioners Report in Case No. 73-186-C, styled Transok Pipe Line Company, an Oklahoma Corporation, Plaintiff vs. An easement for the preparation,

BLEED THROUGH

use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma, *AND* The United States of America as a matter affecting the title to certain Indian lands previously allotted in fee with certain restraints on alienation and presently restricted under the law as to the present owners of said lands, *AND* Elizabeth Star, Beaden Hope, Frances Wesley Wood, Yarner Tebe, Arthur Tebe, Polly Tebe, John Tebe, Charlie Tebe, Harry Carbitcher, Malinda Harjo, Sampson Harjo, Molly Mae Brown, Buster Brown, Josephine Brown, Wisey Mae Brown, Tootsie Brown, Agnes Lucas, Louis Hopia, Susie Lasley, Maxwell Darks, P. G. Parks, Marvin Olivo, Defendants, in the United States District Court for the Eastern District of Oklahoma, a related pleading (App. F, p. 39).

(16) Unreported Order overruling Objections to Commissioners Report in Case No. 73-186-C, in the United States District Court for the Eastern District of Oklahoma, styled as set out in (15) above (App. F, p. 44).

(17) Unreported Order granting Plaintiff's Motion (Respondent herein) for New Trial in the United States District Court for the Eastern District of Oklahoma, No. 73-186-C, dated December 31, 1975, in case styled as set out in (15) (App. F, p. 46).

(18) Undated letter from Acting Director of the United States Department of Interior to Petitioner Darks, received in July, 1973 (App. G, p. 56).

(19) Letter from Deputy Area Director, Bureau of Indian Affairs to Petitioner Darks, dated January 21, 1976 (App. G, p. 57).

GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

The final order of the Supreme Court of Oklahoma was entered on September 8, 1975. A timely motion for rehearing was denied on December 9, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a conglomerate gas transmission company can trespass on land causing damages to Petitioner Darks' land and cattle owned by Petitioners situated thereon with the trespass occurring prior to the time permitted for entry onto the land in a condemnation action without Petitioners having adequate remedy (A) to obtain a Temporary Restraining Order or Injunction to halt the trespass and resulting damages and (B) whether the conglomerate gas transmission company is required to even pay damages resulting to land and cattle while such trespass is occurring under Amendments V and XIV, United States Constitution.

(2) Whether Petitioners have adequate remedy for the trespass and resulting damages under the statutes pertaining to condemnation for an underground gas storage warehouse under 52 O.S. §§ 36.1-36.7; 66 O.S. §§ 53-55 and § 1, Act of May 27, 1908, 35 Statutes 312 as required under Amendments V and XIV, United States Constitution.

BLEED THROUGH

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED IN THESE CASES

(See Appendix H)

1. Amendment V, United States Constitution, Due process clause (App. H, p. 58);

2. Amendment XIV, United States Constitution, § 1 Equal protection and due process (App. H, p. 58);

3. 15 U.S.C. 717 f(c) and f(h), Construction, extension or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings (App. H, p. 59);

4. Art. 2, Oklahoma Constitution, Bill of Rights, § 6 Courts of justice open—Remedies for wrongs—Sale, denial or delay, § 7 Due process of law, § 23 Private property—Taking or damaging for private use, § 24 Private property—Public use—Character of use a judicial question, § 32 Perpetuities—Monopolies—Primogeniture—Entailments (App. H, p. 62);

5. Art. 7, Oklahoma Constitution—Courts in general, § 1 Courts in which judicial power vested, § 2 Supreme Court—Appellate jurisdiction—Original jurisdiction—Writs (App. H, p. 64);

6. Art. 9, Oklahoma Constitution—Corporation Commission, § 15 Creation—Terms of office—Vacancies, § 16 Qualifications of commissioners, § 18 Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers, § 19 Power of court of record—Additional powers—Failure or refusal to obey orders, § 20 Appeals to Supreme Court—Other courts to have no jurisdiction—Mandamus and prohibition (App. H, p. 65);

7. 52 O.S., GAS COMPANIES AND PIPE LINES—UNDERGROUND STORAGE OF GAS, § 36.1 Definitions, § 36.2 Public interest and welfare, § 36.3 Condemnation of

subsurface stratum or formation—Operation of storage facilities—Limitations, § 36.4 Certificate of commission, § 36.5 Petition to district court—Examination and determination—Subsequent proceedings, § 36.6 Ownership of gas, § 36.7 Partial invalidity (App. H, p. 72);

8. 66 O.S., RAILROADS, § 53 Taking by eminent domain—Commissioners Appointment and proceedings—Right to construct road, § 54 Compensation, accrual or right to, § 55 Review of commissioners' report—Jury trial—Notice (App. H, p. 77);

9. 12 O.S., CIVIL PROCEDURE, § 3 Division of remedies, § 4 Actions defined, § 5 Special proceedings, § 95(3) Limitations of other actions, § 952 Jurisdiction of Supreme Court, § 990 Appeal to Supreme Court by filing petition in error—Court rules—Record of appeal, § 993 Appeal from certain interlocutory orders—Undertaking, § 1038 Limitation, § 1382 Cause of injunction—Temporary injunction, § 1383 When and by whom injunction granted—Affidavit showing right to, § 1384 Notice to adverse party—Temporary restraint (App. H, p. 80);

10. 23 O.S., DAMAGES, § 9 Jury may give exemplary damages, when— § 68 Exemplary damages for injuries to animals (App. H, p. 86);

11. 60 O.S., Estate in REAL PROPERTY, § 64 Fee title covers what (App. H, p. 87);

12. 25 U.S.C., INDIANS, § 357 Condemnation of lands under laws of state, § 415(a) Leases by Indian owners (App. H, p. 87);

13. Act of May 27, 1908, 35 Statutes 312, An Act for the removal of restrictions from part of the lands of allottees of The Five Civilized Tribes, and for other purposes; § 1 Classification of restricted allottees—Secretary may remove restrictions—Right of eminent domain, § 6 Representatives of Secretary to represent restricted allottees (App. H, p. 89);

BLEED THROUGH

14. Act of August 4, 1947, 61 Statutes 732, An Act relative to restrictions applicable to Indians of the Five Civilized Tribes, and for other purposes, § 1 Half-blood heirs and devisees restricted—Ten-day notice—Consideration to be recited—Grantor present unless excused by Probate Attorney—Not removable to federal court—Court may approve conditionally—Probate Attorney may appeal—Sales of minors and incompetents controlled by state law, § 4 Probate attorney to represent restricted members, § 11 When and how state oil and gas conservation laws apply to restricted land (App. H, p. 91);

15. FEDERAL RULES OF CIVIL PROCEDURE—Process, Summons, Personal Service—Rule 4 (d) (5); Joinder of Persons Needed for Just Adjudication—Rule 19 (a) (b) (3); Misjoinder and Non-Joinder of Parties—Rule 21 (App. H, p. 93).

STATEMENT OF CASE

For purposes of this petition Transok Pipe Line Company will be referred to herein as Respondent. The Respondent, Secretary of Interior in Case No. 73-250 (T.C.), 48708 (S.Ct.), will be referred to as the Secretary of Interior.

On October 25, 1972, Respondent filed Case No. 35868 before the Corporation Commission of Oklahoma seeking to obtain an order and certificate that such area consisting of approximately 3,660 acres of real property, 680 contiguous acres of which is owned by Petitioner Darks was suitable for the underground storage of natural gas in the warehouse in Hughes County, Oklahoma, and for findings as required by 52 O.S. § 36.4 that (a) the underground stratum or formation sought to be acquired is suitable for

the underground storage of natural gas and that its use for such purposes is in the public interest; and (b) for a determination of the amount of *recoverable* oil and native gas, if any, remaining therein. See Art. 9, Constitution of Oklahoma, §§ 15-18, 19-20.

Testimony was transcribed on January 16, 1973, at a hearing before a trial examiner and Order 96291 was entered on March 5, 1973, treated as the required certificate to be attached to the petition to be filed in the state district court and federal district court under 52 O.S. § 36.5 (App. B, p. 9).

The Respondent herein filed petitions in the District Court of Hughes County, Oklahoma, on May 4, 1973, styled Transok Pipe Line Company vs. Maxwell Darks, et al., in cases seeking condemnation of an underground gas storage warehouse under 52 O.S. §§ 36-1-36.7 and 66 O.S. §§ 53-55. The trial court entered its Order of November 21, 1973, overruling request for temporary restraining order, injunction, objections to and request for hearing on commissioners report, request for judicial determination of the necessity of taking and other matters, prior to jury trial. The cases were consolidated for purposes of appeal in companion cases and are now pending on appeal before the Supreme Court of Oklahoma in Cases No. 73-93 (T.C.) 48054 (S.Ct.), No. 73-94 (T.C.) 48055 (S.Ct.) and No. 73-95 (T.C.) 48056 (S.Ct.) with order in No. 73-93 (T.C.) 48054 (S.Ct.) with parts (1) through (11) therein identical to the other two orders, in companion cases appealed (App. D, p. 35). See 12 O.S. §§ 952, 990 and 993.

BLEED THROUGH

On June 25, 1973, Respondent filed a companion condemnation action in the United States District Court for the Eastern District of Oklahoma, styled Transok Pipe Line Company vs. An easement, et al., No. 73-186-C. The case was filed against 19 restricted members of The Five Civilized Tribes, none of which were the original allottees in tracts 1 and 2 therein in which Petitioner Darks owned a fee interest, three Caucasian co-tenants including Petitioner Darks and the United States of America, alleging jurisdiction under 25 U.S.C. § 357, with no diversity of citizenship involved.

The Trial Judge in the federal district court overruled Petitioner Darks' Motion to bring all defendants from Hughes County district court cases into the federal court on July 30, 1973, to avoid a multiplicity of lawsuits on a common nucleus of operative facts with the reason presented for such consolidation being one subject matter—the gas storage warehouse—or, in the alternative, dismiss as to defendants Petitioner Darks, and P. G. Parks therein who were not Indians but being forced to defend their fee ownership in two trial forums, with authority for making all owners in the warehouse parties in the federal case or dismissing as to defendants therein Darks and P. G. Parks being Federal Rules of Civil Procedure No. 19 (a), (b) and (c) and Rule 21.

With no relief forthcoming from the federal district court, Petitioner Darks filed request for Writ of Prohibition with the United States Court of Appeals, 10th Circuit, attacking jurisdiction to proceed as to Petitioner Darks and all other defendants which was overruled on April 15, 1975. (See App. E, p. 38.)

Petitioner Darks would state that the United States District Attorney—not the United States Probate Attorney, also known as U. S. Trial Attorney, as required by the Act of May 27, 1908, § 6, 35 Statutes 312, and § 4 of the Act of August 4, 1947, 61 Statutes 732—settled this case for the Indian defendants without the Secretary of Interior an indispensable party, even made a party to the case, nor was he served with notice as required by Federal Rules of Civil Procedure, Rule 4 (d) (5), nor were any signatures of restricted tribe members affixed to any settlement reflected in the case with the Order approving settlement filed on August 28, 1975. The settlement was for a mere pittance of actual worth as reflected by the offer of proof by the licensed petroleum engineer with six years experience with Mobil Oil Corporation, offered in behalf of Petitioner Darks and other Caucasian defendants desiring a jury trial. In fact, neither the Secretary of Interior nor his representative, the Bureau of Indian Affairs, would give written approval of the Certificate and Order of the Corporation Commission of March 5, 1973, in Case No. 35868, Order No. 96291, required by § 11, Act of August 4, 1947, 61 Statutes 732, before such certificate is valid and legally binding as to land of restricted members of The Five Civilized Tribes. Since the Order and Certificate is void *ab initio* and void on its face for other reasons to be discussed later herein, it is also void as to the proceedings in the federal district court because the Secretary of Interior would not give his written approval and a valid certificate described in 52 O.S. § 36.4(b) is a mandatory condition precedent to further proceedings in any district court as set out in 52 O.S. § 36.5, if the Respondent ever had jurisdiction to proceed in

BLEED THROUGH

this case. Thus the federal district court has no jurisdiction to proceed in this case. See *U. S.* v. *Oklahoma Gas and Electric Company*, 127 F.2d 349, *Aff'd* 318 U.S. 206, 63 S.Ct. 534.

Objections to trespass by the Respondent prior to time of authorized possession of the land under Art. 2, Constitution of Oklahoma, § 24 and 66 O.S. § 53 was raised in the state district court cases in which Petitioner Darks filed an affidavit on June 11, 1973, stating evidence of trespass and damages prior thereto, seeking temporary restraining order under 12 O.S. §§ 1382-1384 and due process of law and setting out the malicious and intentional cutting of fences, damages to land and damages to registered Santa Gertrudis cattle, *etc.*, which the state trial court refused to hear stating application for restraining order and trespass damages was a separate cause of action. The transcript of argument in the state trial court on Motion to Dismiss reflects the following by Mr. Charles Crane, attorney for Respondent (Tr. p. 43):

> "*Mr. Crane*
>
> "Your honor, Mr. Smith tried to raise the same question and Mr. Darks did too, and Judge Howell told them at that time, I think quite properly that if there has been any damages done to Mr. Darks property by reason of any illegal or improper entry by this company or any other, that he has an action at law. It has nothing to do with the motion to dismiss which is what we are supposed to be arguing right now."

On July 11, 1973, Petitioner Darks' attorney filed an Affidavit pleading alleging trespass and damages by Respondent in the federal district court and seeking a restraining order and injunction with offer of proof denied at the

hearing and in Order of July 30, 1973. The court stating such remedy and trespass damages would proceed in a separate action in law. Thereafter, the third Pre-Trial Order of January 3, 1975, ordered Petitioner Darks not to introduce proof of damages prior to October 1, 1973, the date the Respondent continued possession of the land under "color of title" as set out in 66 O.S. § 53, nor was Petitioner Darks or any other defendant permitted to offer any proof of any element of damages after October 1, 1973, except (visible) surface and a 1/8th part of landowner's oil and gas minerals in place in the matrix below the surface.

When the state trial court and the federal trial court refused to halt the proceedings and trespass and damages occurring thereunder, Petitioner Darks returned to the Corporation Commission of Oklahoma to again attack their jurisdiction to proceed without the required Certificate of Convenience and Necessity described in 15 U.S.C. § 717 f (c) and (h) and to attack the void order and proceedings as violating due process under Amendment XIV of the Constitution which was overruled in its order of July 23, 1973 (App. B, p. 15). See Art. 7, Constitution of Oklahoma, §§ 1-2; Art. 9, Constitution of Oklahoma, § 20.

When it became obvious to Petitioner Darks that no remedy was forthcoming in the state trial court, the federal trial court or the Corporation Commission of Oklahoma, Petitioner Darks filed a Petition seeking Writ of Prohibition on July 13, 1973, in the Supreme Court of Oklahoma seeking to show that the Corporation Commission did not have jurisdiction in Case No. 35868, and if they did the proceedings therein were void and seeking to halt the proceedings

BLEED THROUGH

in the state district court because the state district court refused to hold a hearing in order to make a judicial determination of the necessity of taking or to hold a hearing so that Petitioner Darks could present evidence of trespass and resulting damages and the pleadings therein pointed out the proceedings were contrary to Amendments V and XIV, United States Constitution. A hearing was held on July 17, 1973, not transcribed because Petitioner Darks was advised no reporter was available, and the Petition seeking Writ of Prohibition was denied on July 31, 1973, in Case No. 46709 (App. C, p. 17). See Art. 7, Constitution of Oklahoma, §§ 1-2.

With no remedy available in any of the cases described, Petitioner Darks filed an action for trespass damages to land against Respondent and Petitioners filed an action for trespass damages to cattle against Respondent, both filed on November 24, 1974, and both cases seeking actual and exemplary damages, with Amended Petitions therein (App. A, pp. 1 and 4).

Temporary restraining order or injunction was not now sought because Respondent was now on the land under "color of title" and Petitioner Darks was not now financially solvent enough to post bond for the large amount of "put" and "take" natural gas in and out of the warehouse. Mr. Charles Crane, attorney for Respondent, filed a petition seeking Writs of Prohibition with the Supreme Court of Oklahoma on these cases for trespass and damages prior to time of entry under "color of title" which was granted by the Supreme Court of Oklahoma on September 8, 1975 (App. A, p. 7).

In its Order granting Writs of Prohibition against Petitioners, the court states, "that they sound in tort (trespass) and seek damages against the real property and personalty located thereon." The court then cites *Delhi Gas Pipe Line Co.* v. *Swanson*, 520 P.2d 670 (1960); *Oklahoma City* v. *Wells*, 91 P.2d 1077 (1939); *Cities Service Gas Co.* v. *Heubner*, 197 P.2d 985 (1948); and *Graham* v. *City of Duncan*, 354 P.2d 458 (1960). These cases are moot as to trespass damages prior to the time of legal entry as was pointed out in the pleadings. To clarify the order of the court, Petitioners filed a Motion for Oral Argument and Rehearing, and asked the court, among other things, to specify which condemnation case trespass damages as to the cattle partnership should proceed through. The request for Oral Argument and Rehearing again pointed out that Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., was not made a party defendant to any of the condemnation cases. On December 9, 1975, the Supreme Court of Oklahoma simply entered its Order stating, "Oral argument and rehearing denied." (See App. A, p. 8; also Art. 7, Constitution of Oklahoma, §§ 1-2.)

Wtih no instructions from the court as to where the cases would proceed, Petitioner Darks included a request for trespass damages in his Motion for New Trial in the federal district court condemnation case, with a copy of the Order of the Supreme Court of Oklahoma of September 8, 1975, attached, as this was the only forum available for such a jury trial. The companion state court condemnation cases were no longer at the trial level, but were on appeal, prior to jury trial, to the Supreme Court of Oklahoma. In fact, at page 19 in Respondent's Answer Brief filed therein

BLEED THROUGH

on January 26, 1976, Mr. Robert Lawrence, attorney for Respondent, states in part, "*A corporation with the power of eminent domain can never trespass so long as the use or intended use is a proper public function.*" (Emphasis ours.)

The federal district court did not grant a new trial to Petitioner Darks but did grant the Respondent a new trial on (visible) surface damages which is one of two elements of damages permitted to be offered at the first jury trial, the other being a 1/8th part of landowner's oil and gas minerals "in place" in the matrix which, incidentally, were the only elements of damages specifically assigned a damage value by the commissioners in their *ex parte* appraisement returns, contrary to proposed instructions offered to the court by Petitioner Darks for the commissioners, overruled by the trial judge in both the state court and the federal court (App. D, p. 35 and App. F, p. 44.) See *U. S.* v. *Merz*, 376 U.S. 192, 84 S.Ct. 639 (1964).

The request to present trespass damages to the approaching new trial was denied as were other requests to permit elements of damage to be introduced that were offered at the first jury trial, *i.e.*, (1) Value of easement from surface to subsurface warehouse at —2,300 feet in the matrix and (2) Petitioner Darks' pro rata value of the warehouse fee with offer of proof at the first jury trial, overruled by the trial judge, by a licensed petroleum engineer that the warehouse has a fair market value on October 1, 1973, of $12,600,000.00 with Petitioner Darks pro rata value of his part—in the federal district court case—of $200,920.00. Both the state trial court and the federal district court refused to appoint a petroleum engineer as a

commissioner or to appoint one to advise them. The petroleum engineer also made offer that the warehouse was not necessary to the operation of a gas transmission line.

The trial court stated in an Order prior to jury trial that the subsurface warehouse was being condemned but refused to allow proof of value in its taking. Offer was also made and overruled at the first jury trial of the value of the necessary easement to the subsurface warehouse facility. At page 4 of Order of December 31, 1975 (App. F, p. 51), the federal trial court quotes the same cases cited by the Supreme Court of Oklahoma in its Order of September 8, 1975, and then states, "The foregoing cases do not stand for the proposition that in such circumstances all such damages must be recovered in the condemnation actions." At page 5 of the order (App. F, p. 52), the court continues, "The pendency of this case was not mentioned in the Supreme Court's writ or in the pleadings." Petitioners do not find mention of any trial court in Order of September 8, 1975, and Petitioners have been denied remedy and due process in their causes of action for damages caused by trespass (App. F, p. 46).

WHEN FEDERAL QUESTIONS WERE RAISED

Petitioners did not specifically raise the issue of violation of Amendments V and XIV in the pleadings in Cases No. 48708 (S.Ct.) and 48709 (S.Ct.). It was raised in the oral argument, not transcribed, on August 5, 1975, at which time Petitioners were present before the Supreme Court of Oklahoma but not permitted to testify by the court. When the court entered its Order of September 8, 1975,

BLEED THROUGH

Petitioners filed Motion seeking Oral Argument and Rehearing requesting instructions as to which condemnation case trespass damages should proceed through. It did not appear that violation of Amendments V and XIV was an issue in the cases. The Supreme Court of Oklahoma entered its Order of December 9, 1975, merely stating, "Oral Argument and Rehearing Denied." It became an obvious issue in these cases from which writs are sought when the federal district court refused to allow elements of trespass damages included as an element of damages when it granted Respondent a new trial on (visible) surface damages only, even though Petitioner Darks requested a new trial on trespass damages and other elements of damages.

The issue of due process under Amendment XIV was raised at the earliest possible time in the federal district court case by Objections to Respondents Right to Take the land of Petitioner Darks filed on July 11, 1973, prior to judicial determination and overruled on July 24, 1973. Petitioner Darks again raised the question of violation of Amendments V and XIV in Objections to Commissioners Report filed on October 26, 1973, which, according to the *Casteel* case, is the only place any objections can be raised in the "special proceedings"—but after Respondent is already in possession of the land. See 12 O.S. §§ 3-5.

At VIII therein Petitioner Darks states:

> "That these proceedings are void and should not be allowed to continue as to the Defendant Maxwell Darks, specifically, as he has evidenced his intent to participate as a joint owner in the gas storage project, and has also evidenced his desire to bid on the interest of restricted Indians included herein at competitive

bidding as authorized by public law 336 passed in 1947, being a violation of equal protection of the law as guaranteed by the Fourteenth Amendment in the United States Constitution and all other pertinent state and federal law."

See Objections to Commissioners' Report (App. F, p. 39).

Objections to Commissioner Report was overruled on November 16, 1973, without the requested hearing to cross-examine commissioners as to their business connections with Respondent and for other reasons (App. F, p. 44).

Objections in the state district court cases were raised by Motion to Dismiss filed on May 29, 1973, in which it is stated under 11(2) therein the following:

"That the statutory procedure for the hearing of this action, the appointment of appraisers, and the assessment of damages does not meet minimal standards of procedural due process as required by Constitution of the United States."

Overruled on June 7, 1973, by Order of the Hughes County District Court.

Petitioner Darks again raised lack of due process under Amendments V and XIV in his Objections to Commissioners Report in the state cases which according to the *Casteel* case is the only place in the "special proceedings" it can be raised—but after Respondent is already in possession of the land. At IV therein filed on July 3, 1973, Petitioner Darks states as follows:

"That when these condemnation cases were filed, immediately District Judge Bob Howell held an ex parte hearing without the defendants being advised or

BLEED THROUGH

> notified in which he entered an order that (1) Transok Pipe Line Company has the right of eminent domain and (2) the fact that said property is necessary and can be condemned by Transok Pipe Line Company purposes, all contrary to law including the defendants' right to be present and to contest such order. Further there is no showing in the testimony or record of this case that Transok Pipe Line Company produced any official of the company to testify in this matter. Defendants are entitled to be present and to have the right to cross-examine in such matters relative to the legal right to bring this condemnation and such ex parte hearing violates the defendants' due process rights under the 5th and 14th Amendments of the United States Constitution."

See Objections to Commissioners' Report (App. D, p. 18); and Amended Objections to Commissioners Report filed on September 5, 1973, with Exhibits Attached (App. D, p. 26).

The state trial court then waited 16 months and on November 21, 1974, without a hearing where commissioners could be examined as to their method of appraisement and their business relationship with Respondent, overruled all objections raised by Petitioner Darks (App. D, p. 35).

REASONS FOR GRANTING THE WRIT

(1). *Question*: There are no Oklahoma cases that describe what type of district court proceedings will hear trespass and damages occurring prior to the time Respondent continues possession of land under "color of title" under 66 O.S. § 53. Art. 2, Constitution of Oklahoma, § 24 and 66 O.S. § 54 clearly state no entry will be made on the land in a condemnation action until landowner can obtain

"immediate receipt" of money described in commissioners' appraisement of damages to the land caused by the taking of land by Respondent, with Art. 2, Constitution of Oklahoma, § 24 stating that the determination of the necessity of such taking is a judicial question. Petitioner Darks was not able to obtain the deposit by Respondent with the District Court Clerk after commissioners made their return as Respondent intentionally commingled it with deposits of other landowners in order to prevent them having money to use to defend their property as the burden is on the landowners under the Oklahoma procedure—not the Respondent who takes the role of the owner, and Respondent continued to occupy the land contrary to 66 O.S. § 54. This is evidenced by (8) in Order of state trial court of November 21, 1974, in Case No. 73-93 (T.C.) 48054 (S.Ct.) (App. D, p. 35). See *Kelly, et al.* v. *Oklahoma Turnpike Authority*, 269 P.2d 359 (1954).

The *Casteel* case clearly demonstrates the lack of procedural due process in the Oklahoma law under the "special" condemnation statutes as it states no Answer or other unauthorized pleadings will be considered in objections to commissioners' appraisement or lack of a judicial determination. Only three pleadings are authorized (a) Petition, (b) Objections to Commissioners' Report, filed in this case after Respondent had been in possession, admittedly in evidence in the record of the state condemnation cases for over six months, and (c) Request for a jury trial. Dicta in the *Casteel* case, however, indicates that the Judge could hear a request for restraining order upon a proper showing of the need without limiting such relief to condemnor only (Respondent herein) as described in 12 O.S. §§ 1382-1384,

BLEED THROUGH

although no such hearing was allowed. The record reflects a letter from Mr. Charles Crane dated October 9, 1973, threatening Petitioner Darks with prosecution for the commission of a felony if he used self help to protect his property from continuing trespass damages although Petitioner Darks had not received any compensation (App. D, p. 34). Following this letter, Petitioner Darks accepted service on October 24, 1974, in open court, of a carte blanche temporary restraining order restraining him from interfering with the operation of Respondent on Petitioner Darks' land even though he could not obtain the commingled temporary compensation deposited with the district court clerk even though the court ordered Respondent to specify which part belonged to Petitioner Darks in its Order filed on February 14, 1974, noting in the order, "without prejudice to any of his legal rights in this case." The court again ordered Respondent to comply with the Order on November 21, 1974, in (8) therein but took no overt action to enforce the order of the court. Petitioner Darks could not obtain the temporary compensation but was restrained from interfering with Respondents' agents on his land (App. D, p. 35). See *County Commissioners of Creek County* v. *Casteel*, 522 P.2d 608 (1974).

Art. 2, Constitution of Oklahoma § 24 and 66 O.S. § 53 do not meet minimal due process as there is no requirement for a judicial determination of the necessity to condemn PRIOR to entry, nor has the requested hearing on this point ever been held in the state district court permitting Respondent to trespass and cause damage—which trespass continues at this time in connection with the underground gas storage facilities—without a timely hearing to

halt same. Failure to hold a judicial determination prior to the taking of the land is tantamount to taking life, or liberty before holding a hearing to see if it is being done under due process of law. See *Scott* v. *Danahar*, 343 F.Supp. 1272 (1964); *Town of Ames* v. *Wybrant*, 220 P.2d 693 (1950); Art. 2, Constitution of Oklahoma §§ 6-7.

By issuing the Writs of Prohibition in the two cases before the court, the Supreme Court of Oklahoma has denied Petitioners their right of restraining order and redress for the actual damages and exemplary damages for malicious and intentional trespass resulting in damages without remedy and further proceedings appear to be barred by the two-year statute of limitations in such cases. See 12 O.S. § 95(3); 23 O.S. § 9 and § 68.

(2). Before proceedings under 52 O.S. § 36.1 *et seq.*, it was first necessary for Respondent to obtain the mandatory Certificate of Convenience and Necessity from the Federal Power Commission prior to proceeding in eminent domain for a gas storage warehouse as required by 15 U.S.C. § 717 f (c) and (h), therefore the Corporation Commission of Oklahoma does not have jurisdiction to proceed in Case No. 35868.

Transcripts of all testimony from all hearings in the Corporation Commission Case No. 35868 was included in all trial courts as exhibits in all proceedings in condemnation and the testimony of January 16, 1973, by the Respondents' Operating Superintendent was in part as follows (Petitioner Darks' Ex. 1, p. 42—state trial court):

BLEED THROUGH

"*Witness Summers*:

> "We transport gas for Oklahoma Natural, sometimes for Arkla. We serve several towns, and at the border, and Oklahoma Natural takes over and distributes."

See *Trunkline Gas Company*, 24 F.P.C. 1020, Opinion 320, *rehearing denied* 25 F.P.C. 158 (1960); *La Vaca Gathering Company* v. *Federal Power Commission*, 379 U.S. 574, 85 S.Ct. 486; *Amerada Petroleum Company* v. *Federal Power Commission*, 334 F.2d 404, 379 U.S. 683, 85 S.Ct. 832 (1965).

The Hughes County District Court and the United States District Court did not have jurisdiction to proceed as no valid certificate, required to be attached to the petition in the district court cases seeking eminent domain, was ever obtained from the Corporation Commission. Said certificate attached was void *ab initio* and void on its face. It is void *ab initio* as no proof was offered at the hearing of January 16, 1973, or any other hearing, and no findings are included in the certificate or orders of the Corporation Commission as required by 52 O.S. § 36.3(b) showing the fair market value of the native gas in the channel booch stratum or formation to be condemned compared with the fair market value of the gas storage warehouse in order to determine if the warehouse has a greater value before the Corporation Commission issue the certificate.

Further, 52 O.S. § 36.4(b) requires that the amount of *recoverable* oil and native gas, if any, remaining in the formation be identified as to the amount. The Certificate merely states that there is two billion cubic feet of native gas in the warehouse when the uncontroverted testimony

included as an exhibit in the district court condemnation cases showed three billion cubic feet with two billion cubic feet being economically recoverable. Since the amount of economically recoverable gas is not included in the certificate of March 5, 1973, it is void on its face.

In addition, extra legal matter not authorized by law is included in the order and certificate which was treated by Respondent in bad faith as an order authorizing their entry onto and into the land for purposes of erecting, operating and maintaining the underground gas storage warehouse without first paying compensation for the taking of the land. Such an order is subject to direct or collateral attack at any time. See Art. 7, Constitution of Oklahoma—Courts, in General, § 1; Art. 9, Constitution of Oklahoma—Corporation Commission, §§ 15, 16, 18, 19 and 20; 12 O.S. § 1038; *La Bellman* v. *Gleason and Saunders, Inc.*, 418 P.2d 949; *Gilbertson* v. *Gilbertson*, 489 P.2d 1381.

The taking of a warehouse by a correlative owner therein is a private taking for a private purpose, profitable and certainly desirable, but not essential to operate a gas pipeline, and not permitted by Art. 2, Constitution of Oklahoma, § 23 and § 32. See *Missouri Pacific Railway Company* v. *Nebraska*, 164 U.S. 403, 41 L.Ed. 489; *Ferguson* v. *Ill. C. R. Co.*, 210 N.W. 604, 54 A.L.R. § 1.

The trespass and damages to Petitioners cannot be adjudicated uder 52 O.S. §§ 36.1-36.7, 66 O.S. §§ 53-55, or the Act of May 27, 1908, § 1, 35 Statutes 312, as said statutes do not provide a procedure to appraise all of the elements of damages involved in the taking of the underground gas storage warehouse, much less, trespass damages

BLEED THROUGH

occurring prior to time of entry onto the land under "color of title." Only the (visible) surface can be appraised under these statutes omitting elements of damage for (1) Easement from surface to the subsurface warehouse, (2) Pro rata value of the subsurface warehouse condemned, and (3) 8/8ths of oil and gas minerals in place, although the federal district court allowed offer of proof on a 1/8th royalty interest in the mineral interest in place at the first jury trial although royalty does not legally exist until severed under terms of a valid oil and gas lease at the wellhead as discussed in Kuntz, Oil and Gas, § 38.2, and (4) Trespass damages prior to time of continued possession of the land under "color of title"—if this even be a proper part of condemnation damages—keeping in mind that the partnership entity was not made a party defendant in any of the condemnation cases nor does 66 O.S. § 53 permit exemplary damages for intentional and malicious trespass. See *Emeny* v. *U. S.*, 412 F.2d 1319 (1969); *Consumers Power Company* v. *Allegan State Bank*, 174 N.W.2d 578.

When the Legislature passed the underground gas storage statutes they were persuaded by the conglomerate gas transmission companies that the individuals and small oil companies should not be permitted to own or participate in this very profitable business and ownership in the fee interest described in 60 O.S. § 64 should be condemned under the RAILROAD condemnation statutes for the taking of an EASEMENT for a railroad track *over* the (visible) surface, although 52 O.S. § 36.3 describes the taking of a "subsurface stratum or formation," so 66 O.S. § 53 only permits the taking of "other interest in property as may be required to examine, prepare, maintain and operate such

underground natural gas facility" on the (visible) surface thus allowing Respondent to actually confiscate all necessary fee interest in the "underground" natural gas facilities. At page 28 in Respondent's Answer Brief filed on January 26, 1975, in the companion condemnation cases now pending before the Supreme Court of Oklahoma Respondent denies that Petitioners are even entitled to have the Supreme Court make a judicial determination of the legality of the proceedings under due process pertaining to 66 O.S. §§ 53-55, stating in part, ". . . *if appellant is offended thereby, then his remedy is one of legislative rather than judicial.*" (Emphasis ours.)

Beginning in 1971, the Respondent and representatives of the Secretary of Interior, ex rel. Bureau of Indian Affairs in Muskogee, Oklahoma, were negotiating a long term gas storage contract to store gas in the restricted Indian land under 25 U.S.C. § 415(a). Petitioner Darks was interested in acquiring a long term gas storage lease on the restricted Indian land and notified the Secretary of Interior and the Bureau of Indian Affairs with more than six Mail-o-Grams and letters of his desire to bid on a long term lease or to purchase at competitive bidding under § 1, Act of August 4, 1947, with no response permitting Petitioner Darks to even negotiate such a proposal.

Respondent did not make the Secretary of Interior a party—an indispensable party, nor serve him with notice—in Federal District Court Case No. 73-186-C, as required by Rule 4(d)(5), so the court did not have jurisdiction of the 19 restricted members of the Five Civilized Tribes, or their Caucasian co-tenants, if 25 U.S.C. § 357 ever permitted

BLEED THROUGH

jurisdiction of heirs of allottees and Caucasian co-tenants in the first place.

The state district court and the federal district court refused to let Petitioner Darks take deposition or hold a hearing after the commission made the return to determine how and why commissioners appointed by the courts appraised the land in their *ex parte* appraisement in order to determine, among other things, their financial and business relationship with Respondent. The federal district court later refused to allow Petitioner Darks to take Interrogatories to determine the financial arrangement between one of the commissioners and Respondent with the federal district court stating in its order enjoining Petitioner Darks from taking deposition that Petitioner Darks was attempting to harass the commissioners, all contrary to due process. Petitioner Darks did not attempt to take deposition or Interrogatories of Respondent or the Secretary of Interior, or his representatives in the Bureau of Indian Affairs, as to any possible arrangement on storage leases, as such attempt was deemed futile in view of the federal district court's protective order issued in connection with attempt to examine the Commissioners and Respondent. See *U. S.* v. *Merz*, 376 U.S. 192, 84 S.Ct. 639 (1964).

The proceedings in the federal district court are simply void and the restricted Indians own the foreign gas injected under their land as do the Caucasian co-tenants as set out in 52 O.S. § 36.6. *If* the Respondent and representatives of the Secretary of Interior have an agreement that as soon as Respondent has successfully acquired the interest of Petitioner Darks and other Caucasian defendants, they will

execute or have executed an option for a long term lease for storage of gas in the part of the warehouse belonging to the restricted Indians, such violates the equal protection of Amendments V and XIV because it discriminates against non-Indian landowners, requiring them to relinquish their ownership while the restricted Indians retain their fee, and because Petitioner Darks, *et al.*, are prohibited from engaging in competitive bidding to acquire a long term gas storage lease under 25 U.S.C. § 415(a) or purchasing same under § 1, Act of August 4, 1947, and violates due process of the restricted Indians to sell their lease or fee interest in the warehouse at competitive bidding to the highest bidder. See undated letter written after June 18, 1973, but before July 14, 1973, from Acting Director, United States Department of Interior. (App. G, p. 56); see also letter from Acting Area Director, Bureau of Indian Affairs, dated Jan. 21, 1976, an exhibit in the federal case, to Petitioner Darks (App. G, p. 57).

EXPLANATION

H. Maxwell Darks represents himself in Case No. 74-250 (T.C.) 48708 (S.Ct.). He represents his partnership interest in the partnership entity of Maxwell Darks and Les Starks, d b a Greasy Creek Cattle Company, in Case No. 74-251 (T.C. 48709 (S.Ct.). The reason H. Maxwell Darks is representing himself is that he is the only known attorney in Oklahoma who has been sufficiently motivated by the threats and acts of the frighteningly powerful Respondent to dare counterattack Respondent in this forum.

BLEED THROUGH

H. Maxwell Darks does not represent Les Starks, individually. H. Maxwell Darks is a federal government employee. Although representation of Petitioner Starks did not appear to him to be improper in this peculiar circumstances, either ethically or by regulation, he did not desire to take this risk. This petition was read to and explained to Mr. Les Starks, not an attorney but a rancher; not a pauper, but an individual in financial trouble because of the cattle operation described herein, and having insufficient funds to employ counsel in a proceedings of this magnitude. After hearing the petition read by H. Maxwell Darks, Mr. Les Starks asked him to insert herein his desire to adopt the same position stated in behalf of Petitioner Darks in Case No. 74-251 (T.C.) 48709 (S.Ct.). H. Maxwell Darks will proceed to represent Mr. Les Starks if the Court so orders. Petitioner Starks is of Five Civilized Tribes lineage, unrestricted. If this Honorable Court grants this writ, Petitioners will proceed with other legal counsel, economics permitting.

ARGUMENT

52 O.S. §§ 36.1-36.7, 66 O.S. §§ 53-55, and § 1, Act of May 27, 1908, simply do not provide adequate procedural safeguards, nor does this law cover the substantive damages caused in trespass, nor does the law cover all of the elements of substantive damages being taken or confiscated—the subsurface warehouse—and these decisions on matters of state law are decisions on federal questions of substance not heretofore determined by this Court, and the courts have decided other questions heretofore decided by this

Court, involving Amendments V and XIV, contrary to the decisions of this Court under the United States Constitution.

Petitioner Darks cannot have his "one" day in court. The condemnation law is written to favor Respondent and Petitioner Darks must face, at a minimum, proceedings in three forums in order to defend his land. The proceedings under 52 O.S. § 36.1, *et seq.*, requires a proceedings before the Corporation Commission of Oklahoma, followed by condemnation proceedings in the district court as set out in 52 O.S. § 36.5 and since the Oklahoma courts and statutes —12 O.S. §§ 1382-1384—prevent any hearing in the district court condemnation to see if a temporary restraining order and injunction should issue to stop the trespass and damages, Petitioner Darks is required to file a third action to possibly stop the trespass and resulting damages. Such proceedings are designed to destroy the financial ability of the landowner to resist the taking of his land—all without a judicial hearing to determine Respondent's right to take it in the state district court.

By granting the Writs of Prohibition in the two cases herein, the Supreme Court of Oklahoma has made an unwritten pre-determination (outside the scope of due process of law), that when all briefs are finally submitted in the three related condemnation cases appealed from the Hughes County District Court, and now pending before the Supreme Court of Oklahoma, the Court will write a decision in those cases showing that these condemnation cases have proceeded according to due process of law with no remedy for trespass to be adjudicated therein. At page 26 in the Answer Brief in those related cases, brief filed on January

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26, 1976, by Mr. Robert Lawrence, Respondent now states, "*It is submitted that Appellant has no action in tort.*" (Emphasis ours.) Petitioners would have included those three companion cases in this *writ of certiorari* had the unwritten decision been reduced to a written decision at the time this petition seeking writ of certiorari was prepared.

If Respondent can invade private property and cause malicious and intentional damages to land and cattle without the Petitioners having a remedy by restraining order or injunction followed by Petitioners not permitted to seek actual and exemplary damages, contrary to public policy, followed by allowing the conglomerate gas transmission company to confiscate the underground gas storage warehouse without Petitioner Darks having a remedy elevates the gas transmission company to a position of primacy and prestige somewhat exceeding the supreme sovereign, The United States of America, from which Respondent's power to condemn the warehouse springs, if it does exist in this case. The supreme sovereign was itself required to pay compensation for the taking of a subsurface helium gas storage warehouse—not merely the visible surface and 8/8ths of the oil and gas minerals therein—as set out in the *Emeny* case. Likewise, Michigan required the Consumers Power Company to pay for the subsurface warehouse. Petitioner Darks, and the other Caucasian defendants and the restricted Indian defendants are the owners of their pro rata part of the warehouse and all foreign gas injected into their land and thereafter converted by Respondent as set out in 52 O.S. § 36.6. The writ of certiorari should be granted to give relief to Petitioners, to establish guidelines under due process, and to stop similar

barbarian proceedings by the gas transmission companies against individual landowners occurring in the United States at this time, all contrary to due process under Amendments V and XIV, Constitution of the United States.

Respectfully submitted,

H. MAXWELL DARKS, Attorney
313 South 103rd Street
Oklahoma City, Oklahoma 73139
Phone (405) 231-4451 or 794-0657

March, 1976

APPENDICES

APPENDIX A

FILED
HUGHES COUNTY
MAR 3 - 1975
LOIS MERCHANT, Court Clerk
By Lois Merchant

IN THE DISTRICT COURT OF HUGHES COUNTY
STATE OF OKLAHOMA

MAXWELL DARKS	)	
	)	
Plaintiff	)	
vs.	)	No. C-74-250
	)	
TRANSOK PIPELINE COMPANY	)	
	)	
Defendant	)	

AMENDED PETITION

COMES NOW the Plaintiff and for cause of action against the Defendants alleges and states:

I

That Plaintiff is the actual owner and in possession of certain real property located in Hughes County, Oklahoma, more specifically described as follows, to-wit:

All of W2, SW4, S15; and SE4, S16; and NE4 and SE4, NW4, and SW4, and W2, SE4, S21; and NW 4, and W2, SW4, S 22; and NE4, NE4, S28, TN8, R11E, Hughes County, Oklahoma

An undivided ½ of E2, SE4, S21, TN8, R11E, Hughes County, Oklahoma

That the Plaintiff was the owner and in possession of said real property at all times material herein.

II

That on or about the 5th day of April, 1973, the Defendant by and through its duly authorized agent or agents, the identity of which is unknown to this Plaintiff, but well known to this Defendant, unlawfully, wrongfully and maliciously entered upon Plaintiff's land and took down fences standing upon said land and bulldozed pasture land.

III

That this Plaintiff on or about the 10th day of April, 1973, gave actual notice to the Defendant, Transok Pipeline Company, through its agents, to refrain from any further entry upon this Plaintiff's land without his express permission.

IV

That on or about the 17th day of April, 1973, and the 17th day of May, 1973, the Defendant, Transok Pipeline Company, by and through its duly authorized agents, again unlawfully, maliciously and wrongfully entered upon the lands of this Plaintiff above described. That said entry was made after full and complete notice to refrain from further trespass, and was made with reckless disregard to the rights of this Plaintiff.

V

That on or about the 4th day of May, 1973, this Defendant filed a series of condemnation proceedings against this Plaintiff and others in the District Court of Hughes County, Oklahoma, No.'s C-73-93 through C-73-102; that this Defendant desposited a sum of money with the District Court Clerk of Hughes County, Oklahoma, in accord with a report of commissioners in the above referenced cases, on or about the 25th day of June, 1973. Due to acts of this Defendant, Plaintiff was unable to withdraw said sums until this Court ordered same on December 13, 1974.

VI

That from on or about the 15th day of April, 1973, and on subsequent dates thereafter up to and including the present date, the Defendant, Transok Pipeline Company, by and through its duly authorized agents, unlawfully, maliciously and wrongfully injected foreign natural gas into the lands of this Plaintiff above described in quantities unknown to this Plaintiff, but well known to the Defendant, Transok Pipeline Company, into the Channel Booch Sand formation.

VII

That as a direct result of this trespass, Plaintiff's pasture land and fences have suffered actual damage in the sum of $5,000.00; actual damage to Plaintiff's gas storage rights in the sum of $25,000.00; that as a result of the willful, wrongful and malicious entry by these Defendants this Plaintiff is entitled to punitive damages in the sum of $100,000.00.

WHEREFORE, premises considered, this Plaintiff prays recovery of damages in the sum of $130,000.00 with interest thereon at the rate of 10% per annum from and after the 17th day of May, 1973, until judgment, and at the rate of 10% per annum from the date of judgment until paid; costs of this action; and all other just and equitable relief.

s/ Carl Michael Smith
CARL MICHAEL SMITH and
ROBERT G. GROVE
324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorneys for Plaintiff

[Certificate of Mailing omitted.]

[APPENDIX]

FILED
HUGHES COUNTY
MAR 3 - 1975
LOIS MERCHANT, Court Clerk
By Lois Merchant

IN THE DISTRICT COURT OF HUGHES COUNTY
STATE OF OKLAHOMA

MAXWELL DARKS and	)	
LES STARKS, d/b/a	)	
GREASY CREEK CATTLE COMPANY	)	
Plaintiff	)	
vs.	)	C. 74-251
	)	
TRANSOK PIPELINE COMPANY	)	
Defendant	)	

AMENDED PETITION

COME NOW the Plaintiffs and for cause of action against the Defendant allege and state:

I

That on or about April, 1973, and at all other times material herein, these Plaintiffs were operating a joint venture cattle business on certain real property located in Hughes County, Oklahoma, more specifically described as follows, to-wit:

All of W2, SW4, S15; and SE4, S16; and NE4 and SE4, NW4, and SW4, and W2, SE4, S21; and NW4, and W2, SW4, S22; and NE4, NE4, S28, TN8, R11E, Hughes County, Oklahoma

An undivided ½ of E2, SE4, S21, TN8, R11E, Hughes County, Oklahoma

II

That on or about the 5th day of April, 1973, the Defendant, by and through its duly authorized agent or agents,

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the identity of which are unknown to this Plaintiff, but well known to this Defendant, unlawfully, wrongfully and maliciously entered upon the above described real property on which these Plaintiffs were conducting their business operations, and took down fences standing upon said land, allowing cattle owned by these Plaintiffs to escape therefrom and further allowing mixed breed bulls into segregated pastures containing registered Santa Gertrudis heifers, which were being used in a special breeding program.

III

That on or about the 10th day of April, 1973, Plaintiff, Maxwell Darks, gave actual notice to the Defendant, Transok Pipeline Company, through its agents, to refrain from any further entry upon this Plaintiff's land without his express permission. That on or about the 17th day of April, 1973, the Defendant, Transok Pipeline Company, by and through its duly authorized agents, again unlawfully, maliciously and wrongfully entered upon the above described property, cut fences and allowed Plaintiff's mixed breed bulls to enter into the segregated pasture with their Santa Gertrudis heifers. That said entry was made after full and complete notice to Defendant to refrain from further trespass, and was made with reckless disregard to the rights of these Plaintiffs.

IV

That on or about the 4th day of May, 1973, this Defendant filed a series of condemnation proceedings against Plaintiff, Maxwell Darks, and others in the District Court of Hughes County, Oklahoma, Nos. C-73-93 through 73-102; that this Defendant deposited a sum of money with the District Court Clerk of Hughes County, Oklahoma, in accord with a report of commissioners in the above referenced cases, on or about the 25th day of June, 1973; that this was not paid except through Court order of Dec. 13, 1974.

V

That as a direct result of this trespass, these Plaintiffs have suffered the loss of an entire season's breeding program of their registered Santa Gertrudis cattle and have suffered actual damage in the sum of $24,800. That as a result of the willful, wrongful and malicious acts by these Defendants, these Plaintiffs are entitled to punitive damages in the sum of $100,000.

WHEREFORE, premises considered, these Plaintiffs pray recovery of damages in the sum of $124,800 with interest thereon at the rate of 10% per annum from and after the 17th day of April, 1973, until judgment, and at the rate of 10% per annum, from the date of judgment until paid; costs of this action; and all other just and equitable relief.

s/ Carl Michael Smith
ROBERT G. GROVE AND
CARL MICHAEL SMITH
324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorneys for Plaintiffs

[Certificate of Mailing omitted.]

[APPENDIX]

FILED
SUPREME COURT
STATE OF OKLAHOMA
SEP 8 1975
ROSS N. LILLARD, JR., Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Transok Pipe Line Company, a corporation, Petitioner	)	
vs.	)	No.'s 48,708 & 48,709
Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	)	

ORDER

This matter comes on for hearing upon petitioners' application and petition for Writ of Prohibition against the Hon. Frank Seay, Respondent, seeking to prohibit said District Judge from further proceedings in causes No. C-74-250 & 251 pending in Hughes County, Oklahoma.

It further appearing to this Court that such last mentioned causes of action were filed by the owner of lands sought to be condemned and his alleged partner against the petitioner herein and that they sound in tort (trespass) and seek damages against the real premises and personalty located thereon.

This Court being fully advised in the premises, after hearing argument and for good cause shown, finds that petitioner is entitled to Writs of Prohibition against the Respondent, by virtue of our holdings in Delhi Gas Pipe Line Co. vs. Swanson 520 P.2d 670 (1974); Oklahoma City vs. Wells 185 Okl 369, 91 P.2d 1077 (1939); Cities Service

Gas Co. vs. Heubner 200 Okl 521, 197 P.2d 985 (1948) and Graham vs. The City of Duncan 354 P.2d 458 (1960).

WRITS GRANTED.

DONE IN CONFERENCE THIS 8th day of September, 1975, under the superintending control granted this Court, Art. VII § 4 of the Oklahoma Constitution.

s/ Ben T. Williams
CHIEF JUSTICE

(Orders of the Supreme Court of the State of Oklahoma of December 9, 1975.)

* * * * * *

48,708 Transok Pipe Line Co. v. Frank Seay, Judge. Oral argument and rehearing denied.

48,709 Transok Pipe Line Co. v. Frank Seay, Judge. Oral arugment and rehearing denied.

* * * * * *

s/ Ralph P. Hodges
(Acting) Chief Justice

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APPENDIX B

FILED
MARCH 5, 1973

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

APPLICATION OF TRANSOK PIPE LINE COMPANY PURSUANT TO 52 O.S. 36.1 et seq. FOR A CERTIFICATE DECLARING THAT THE CHANNEL BOOCH FORMATION UNDERLYING NE/4 NE/4 SECTION 2, N/2 N/2 SECTION 1, TOWNSHIP 7N, RANGE 10E; E/2 SE/4 AND SE/4 NE/4 SECTION 35, S/2 AND NE/4 AND S/2 S/2 NW/4 SECTION 36, TOWNSHIP 8N, RANGE 10E; SW/4 AND N/2 N/2 SE/4 AND N/2 SECTION 31; S/2 SW/4 AND SE/4 SECTION 30; N/2 NW/4 AND N/2 S/2 NW/4 AND N/2 N/2 NE/4 SECTION 32; S/2 AND NE/4 AND S/2 NW/4 AND NE/4 NW/4 SECTION 29; N/2 AND NW/4 SE/4 AND N/2 SW/4 AND N/2 S/2 SW/4 SECTION 28; S/2 SW/4 SE/4 AND SE/4 SE/4 SECTION 20; S/2 AND NE/4 AND SE/4 NW/4 SECTION 21; W/2 W/2 SECTION 22; W/2 NW/4 SECTION 27, TOWNSHIP 8N, RANGE 11E, HUGHES COUNTY, OKLAHOMA ARE SUITABLE FOR UNDERGROUND STORAGE OF NATURAL GAS AND THAT ITS USE FOR SUCH PURPOSES IS IN THE PUBLIC INTEREST.	CAUSE CD NO. 35868 ORDER NO. 96291

REPORT OF THE COMMISSION
ORDER CORRECTING ORDER NO. 95952

This cause came on for hearing before R. F. Thweatt, Trial Examiner for the Corporation Commission of Okla-

homa, on the 16th day of January, 1972, in the Commission's courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission, for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Mr. Roger R. Scott, Attorney, and Mr. Charles B. Crane, Attorney, appeared for the applicant, *Transok Pipe Line Company*; Mr. William C. Majors appeared for Diamond L., Inc., and Mrs. James Logan; Mr. Maxwell Darks, Attorney, Hubert Douglas, Jr., Miller D. Jones, Ernest Allen, Ms. Elizabeth Star, Bert Wininger, Beaden Hope, and Ms. Frances Wood appeared for themselves. Mr. Harvey Cody, Conservation Attorney, appeared for the Commission.

The Trial Examiner heard the cause and filed his report recommending that the application be granted; time was allowed within which exceptions might be filed to said report, and none having been filed, the Commission being in executive session and being fully advised in the premises, therefore finds as follows:

FINDINGS

1. That this is an application of Transok Pipe Line Company for a certificate declaring that the Channel Booch Formation underlying NE 4 NE 4 Section 2, N 2 N 2 Section 1, Township 7N, Range 10E; E 2 SE 4 and SE 4 NE 4 Section 35, S 2 and NE 4 and S 2 S 2 NW 4 Section 36, Township 8N, Range 10E; SW 4 and N 2 N 2 SE 4 and N 2 Section 31; S 2 SW 4 and SE 4 Section 30; N 2 NW 4 and N 2 S 2 NW 4 and N 2 N 2 NE 4 Section 32; S 2 and NE 4 and S 2 NW 4 and NE 4 NW 4 Section 29; N 2 and NW 4 SE 4 and N 2 SW 4 and N 2 S 2 SW 4 Section 28; S 2 SW 4 SE 4 and SE 4 SE 4 Section 20; S 2 and NE 4 and SE 4 NW 4 Section 21; W 2 W 2 Section 22; W 2 NW 4 Section 27, Township 8N, Range 11E; Hughes County, Oklahoma, are suitable for underground storage of natural

BLEED THROUGH

gas and that its use for such purpose is in the public interest.

2. That the Commission has jurisdiction over the subject matter herein and no protests have been entered to the granting of the application.

3. That the applicant, Transok Pipe Line Company, is an Oklahoma corporation engaged in the business of transporting and transmitting natural gas by pipeline within the State of Oklahoma for ultimate public use, and qualifies as a natural gas public utility as defined in 52 Okla. Statutes 36.1.

4. That the Channel Booch Sand underlying the NE/4 NE/4 Section 2, N 2 N/2 Section 1, T7N, R10E; E 2 SE/4 and SE/4 NE/4 Section 35, S 2 and NE/4 and S/2 S/2 NW/4 Section 36, T8N, R10E, SW/4 and N 2 N/2 SE/4 and N/2 Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S 2 NW 4 and N/2 N 2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N 2 SW 4 and N/2 S/2 SW/4 Section 28; S/2 SW 4 SE 4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE 4 NW 4 Section 21; W/2 W/2 Section 22; W 2 NW/4 Section 27, T8N, R11E, Hughes County, Oklahoma, is a dry gas reservoir, and the volumes of native gas originally in place therein are substantially depleted.

5. That the reservoir which is sought to be used for the underground storage of natural gas is ideally suited for such purpose and has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for applicant's consumers and for the conservation of natural gas, than for the production of the relatively small volumes of native gas which remain therein, and that such storage of gas is necessary to permit the orderly withdrawal of natural gas at periods of peak demand so as to make more readily available the natural gas reserves of the State of Oklahoma to the consumers of

this State; will provide a better year-round market to the various gas fields within the area; will promote the public interest and welfare of the State of Oklahoma; will prevent waste and protect the correlative rights of mineral owners, and is in the public interest.

6. That the Channel Booch Sand underlying the properties described in the application may be reasonably expected to be penetrated by gas displaced or injected into the proposed gas storage reservoir.

7. That no gas from said Booch Sand formation is being used for the secondary recovery of oil.

8. That said Booch Sand formation is not being used by others for the injection, storage, and withdrawal of natural gas in the area of the lands above described; that 2 BCF of native natural gas remains in the reservoir.

9. That the Channel Booch formation aforementioned in this application is identified by the log on the Adelman No. 1-B Well, located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base at approximately 2556 feet.

10. That due to inadvertence and oversight when Order No. 95952 was prepared, the Channel Booch Sand, though named, was not identified as to depth or as to a previously drilled well log in the reservoir area, and this Correction Order is being issued to correctly reflect the testimony at the time of the hearing.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma as follows:

1. That the application of Transok Pipe Line Company for a certificate declaring the Channel Booch Formation underlying the

NE/4 NE/4 Section 2; N/2 N/2 Section 1, Township 7N, Range 10E; E/2 SE/4 and SE/4 NE/4 Section 35; S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 of Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E, Hughes County, Oklahoma,

are suitable for underground storage of natural gas, and that its use for such purposes is in the public interest, and that said application be, and the same is by this order granted.

2. That said Channel Booch formation is identified by the log on the Adelman No. 1-B well located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base of approximately 2556 feet, and that such stratum or formation is suitable for the underground storage of natural gas. That the evidence in this cause shows that there are approximately 2 BCF of native gas remaining in this reservoir.

3. That Transok Pipe Line Company is authorized and empowered to use and operate the Channel Booch Sand underlying the described lands for the purpose of underground storage of natural gas, all in accordance with and subject to the limitations of 52 Okla. Statutes 36.1 et seq.

4. That applicant, Transok Pipe Line Company, will be the owner of all natural gas injected into the said Booch Sand Formation underlying the above-described lands, and

no person other than said applicant shall have the right to produce, take, reduce to possession, waste, or otherwise interfere with, or exercise any control over such gas: provided, however that the owner of said lands, or of other rights or interests therein shall have the right to drill through said formation in such manner as shall protect said formation against pollution and the escape of natural gas therefrom, and in accordance with such orders, rules and regulations as the Commission may make for the protection of such underground storage.

5. That this Order should be and is hereby declared to be the Certificate required by 52 O.S. 1961, Sec. 36.4, as a condition precedent to the filing of the application or petition for condemnation of Transok Pipe Line Company in the courts of the State of Oklahoma.

DONE AND PERFORMED this 5th day of March, 1973.

CORPORATION COMMISSION OF OKLAHOMA

s/ Charles Nesbitt
Charles Nesbitt, Chairman

Ray C. Jones, Vice Chairman

s/ Rex Privett
Rex Privett, Commissioner

ATTEST:

s/ Ed Overholser
Ed Overholser, Secretary

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICATION OF THE TRANSOK PIPELINE COMPANY PURSUANT TO 52 O.S. 36.1 et seq. FOR A CERTIFICATE DECLARING THAT THE CHANNEL BOOCH FORMATION UNDERLYING NE/4 NE/4 SECTION 2, N/2 N/2 SECTION 1, TOWNSHIP 7 NORTH, RANGE 10 EAST: E/2 SE/4 AND SE/4 NE/4 SECTION 35, S/2 AND NE/4 AND S/2 S/2 NW/4 SECTION 36, TOWNSHIP 8 NORTH, RANGE 10 EAST; SW/4 AND N/2 N/2 SE/4 AND N/2 SECTION 31; S/2 SW/4 AND SE/4 SECTION 30; N/2 NW/4 AND N/2 S/2 NW/4 AND N/2 N/2 NE/4 SECTION 32; S/2 AND NE/4 AND S/2 NW/4 AND NE/4 NW/4 SECTION 29; N/2 AND NW/4 SE/4 AND N/2 SW/4 AND N/2 S/2 S/W/4 SECTION 28; S/2 SW/4 SE/4 AND SE/4 SE/4 SECTION 20; S/2 AND NE/4 AND SE/4 NW/4 SECTION 21; W/2 W/2 SECTION 22; W/2 NW/4 SECTION 27, TOWNSHIP 8 NORTH, RANGE 11 EAST, HUGHES COUNTY, OKLAHOMA ARE SUITABLE FOR UNDERGROUND STORAGE OF NATURAL GAS AND THAT ITS USE IS IN THE PUBLIC INTEREST.	)	CAUSE CD 35868 ORDER NO. 98837

ORDER DENYING APPLICATION AND MOTION TO VACATE COMMISSION ORDER NO. 96291

The Application of Maxwell Darks and the Motion of Doctor B. Broadrick, et al, to vacate Commission Order No. 96291, came on for hearing before the Corporation Commission of Oklahoma in its Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, on the 25th day of June,

1973. The Honorable Charles Nesbitt, Chairman; Ray C. Jones, Vice Chairman; and Rex Privett, Commissioner; sitting.

Charles B. Crane and Roger R. Scott, Attorneys, appeared for the Applicant, Transok Pipeline Company; William C. Major, Attorney, appeared for Maxwell Darks, et al; George Verity, Attorney, appeared for Doctor B. Broadrick, et al, and Nell Rhodes Fisher, Attorney, appeared for the Commission.

When the Application and Motion were called on the docket, Applicant and Movant presented argument going to the jurisdiction of the Commission to enter its Order No. 96291, at the conclusion of which the cause was referred to the Trial Examiner for the purpose of taking testimony, limited to jurisdictional facts only. The Trial Examiner proceeded to hear the evidence as to the jurisdictional facts and filed his report recommending the Application and Motion to Vacate Order No. 96291 be denied. Within the time permitted, exceptions were filed to the report by Maxwell Darks and were argued to the Commission on the 19th day of July, 1973, at the conclusion of which the cause was taken under advisement.

Now on this 23rd day of July, 1973, the Commission being in executive session and being fully advised in the premises, finds that all jurisdictional prerequisites of 52 OSA 36.4 had been met by the Applicant, Transok Pipeline Company, at the time of hearing the above entitled cause and issuance of Order No. 96291 therein, and the Application and Motion to Vacate Order No. 96291 should AND THE SAME ARE HEREBY DENIED.

DONE AND PERFORMED this 23rd day of July, 1973.

OKLAHOMA CORPORATION COMMISSION

s/ Charles Nesbitt
Chairman

BLEED THROUGH

Vice-Chairman

s/ Rex Privett
Commissioner

Attest:

s/ Ed Overholser
Secretary

Filed July 23, 1973.

APPENDIX C

ORDER OF THE SUPREME COURT OF THE STATE OF OKLAHOMA

DATED JULY 31, 1973

* * * * * *

46,719 Maxwell Darks v. Corporation Commission of Oklahoma, Ray C. Jones, Charles Nesbitt, Rex Privett, Comm'rs., and District Ct. of Hughes Co., Bob Howell and Bob Rives, et al., Judges.

Application to assume original jurisdiction and for writ of prohibition denied.

* * * * * *

s/ Frank J. Simmons
Acting Chief Justice

APPENDIX D

FILED
HUGHES COUNTY
JUL 3 - 1973
LOIS MERCHANT, Court Clerk
By Lois Merchant

IN THE DISTRICT COURT IN AND FOR
HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, Plaintiff,	)	
-vs-	)	No. C73-93
MAXWELL DARKS, ET. AL., DEFENDANTS.	)	

EXCEPTIONS TO COMMISSIONER'S REPORT

Comes now Robert G. Grove and Mike Smith, attorneys for the defendants they represent herein, namely Maxwell Darks, B. Broadrick and North Centerl Oil Corporation, and state that the reports of the commissioners herein are defective and void for the following reasons, to-wit:

I.

That Transok Pipe Line Company produces and transports natural gas, a part of which is transported in interstate commerce under 15B United States Code, Section 717(a) and before any type of prepairing, erecting, maintaining or operating of a gas storage warehouse, below ground, can be commenced the plaintiff herein must first follow the requirements of the law set out in 15B United States Code, Section 717c and 717f. Plaintiff herein did not follow the law in these sections and has not obtained a certificate of convenience and necessity from the Federal

Power Commission as is required before any action can be commenced relative to this project.

II.

That the proceedings before the Corporation Commission of the State of Oklahoma to obtain a certificate as a condition precedent to commencing this action in case no. 35,868 are void by reason of "I" above and for the further reasons that the orders previously issued in the case were not based on the findings of fact of the Trial Examiner in that numerous rulings therein are contrary and not authorized by the law of Oklahoma and for the further reason that it will be necessary to file a new condemnation action by reason of the fact that new evidence is being obtained by the Corporation Commission for the preparation of a new certificate which will attempt to comply with 52 O.S. 36.1 et. seq. See *Exhibits 1 & 2 attached.*

III.

That the appraisers herein have no authority to act inasmuch as service of summons as required by 66 O.S. § 53 which is the only way legal notice can be given to the defendants herein, was not served according to law but was served by Mr. Seth Eby, an agent of Transok Pipe Line Company, holding himself out as the person authorized to serve the notice as a special service agent in these matters, when he was not and cannot be authorized to serve notice or summons under the above statute and for this reason the service of notice or summons should be quashed.

IV.

That when these condemnation cases were filed, immediately District Judge Bob Howell held an ex parte hearing without the defendants being advised or notified in which he entered an order that (1) Transok Pipe Line Company has the right of eminent domain and (2) the fact that said property is necessary and can be condemned by

Transok Pipe Line Company purposes, all contrary to law including the defendants' right to be present and to contest such order. Further there is no showing in the testimony or record of this case that Transok Pipe Line Company produced any official of the company to testify in this matter. Defendants are entitled to be present and to have the right to cross-examination in such matters relative to the legal right to bring this condemnation and such ex parte hearing violates the defendants' due process rights under the 5th Amendment and the 14th Amendment of the United States Constitution.

V.

That the appraisers appointed May 31, 1973, and reappointed June 7th, 1973, in this case were not appointed according to law in that District Judge Bob Howell disqualified in the case and then remained in the case to appoint appraisers when, as the judge knew, the motion to disqualify went to the judge in all capacities by reason of his testimony in Oklahoma County District Court Case Numbered CSC70-976 wherein he stated his prejudice feelings for attorney Robert G. Grove.

VI

That the appraisers appointed under 66 O.S. § 53 are not qualified to assess the fair market value of this land for underground gas storage warehouse in that the procedure prescribed for appraisement is for railroad right-of-way, which in no way fits the necessary formula to be used to arrive at the fair market value of a "unique" and "novel" value in land, i.e., a subsurface gas storage warehouse facility. The method prescribed for determining damages in no way determines the damage or fair market value of this subsurface fee ownership which is described in 60 O.S. § 64. The fair market value of a underground gas storage warehouse could only be determined by a petroleum engineer with the expertise to arrive at the fair market value. In

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fact, no value was even considered for the subsurface gas storage warehouse but only damage to the surface of the fee ownership and the Ownership of oil and gas rights and oil and gas leasehold estates originating therefrom, all contrary to the law as historically in these matters petroleum engineers arrive at a fair market value knowing the value of such a underground gas storage warehouse. Many times underground gas storage warehouses are appraised and purchased at $2,000.00, $3,000.00 and $4,000.00 per acre based on how much the warehouse up-grades the gas transmission delivery system. That the testimony of the petroleum engineer that testified for Transok Pipe Line Company at the Corporation Commission hearing in case no. 35,868 points out that this is a text book example of a very fine underground gas storage warehouse facility in that with this addition to the Transok Pipe Line Company facilities the company can maintain a constant "high-pressure" of 425 pound on all systems to which they supply gas. See *Exhibit No. 3 attached; also transcript of testimony of Corporation Commission hearing in case no. 35,868 previously made an exhibit herein.*

VII

That the fair market value of the remaining native natural gas in the channel booch sand formation was computed by the appraisers on a 1/8th ROYALTY basis on an amount of gas unknown, based on a fair market price for gas in force 15 years ago, instead of 8/8ths OWNERSHIP of the gas IN PLACE in the channel booch sand formation on not less than 3 billion cubic feet remaining in the reservoir and which there is no intent on the part of the owners of the oil and gas lease owners or Transok Pipe Line Company to produce this gas by reason of this condemnation action. Since the gas will not be produced and saved from the formation under the terms of a valid oil and gas lease it remains the property of the owners of oil and gas rights inasmuch as Transok Pipe Line Company is appropriating

this gas for their own use as "cushion gas" to aid the operation of their gas storage warehouse. In fact, the order of the Corporation Commission completely ignores 1 billion cubic feet of gas. The fair market price prevailing in the area for this amount of gas at the time this condemnation action is proceeding is $500,000.00. The market value for 3 billion cubic feet of gas as described at page 34 in the transcript of testimony of the hearing before the Corporation Commission is $1,500,000.00. The appraisers have ignored 1 billion cubic feet of native natural gas, at a minimum, and by reason of this invalid appraisal TRANSOK PIPE LINE COMPANY IS BEING ALLOWED TO APPROPRIATE WITHOUT COMPENSATION TO ANYONE $500,000.00 worth of gas in this action at a minimum. In fact, NO VALID OIL AND GAS LEASE IS IN FORCE AT THIS TIME ON THE MINERAL OWNERSHIP OF MAXWELL DARKS AND THE OTHER DEFENDANTS HEREIN.

Further, the owners of overriding royalty interest in the gas storage facility have not been made parties to any of the actions herein, nor were the interest of restricted Indians appraised by the commissioners wherein restricted Indians own 265.65 acres of fee ownership with 672.31 acres of ownership of oil and gas mineral rights. See *Exhibit 4 attached.*

VIII.

That in connection with the restricted Indians described in "VII" above the plaintiff is attempting to prevent Maxwell Darks from acquiring their interest at competitive bidding in the District Court of Hughes County, Oklahoma, as authorized under Public Law 336 passed in 1947 by Congress, by bringing a condemnation action in the Federal District Court for the Eastern District of Oklahoma. The defendants in that case are being allowed to challenge the right of Transok Pipe Line Company to bring a condemnation action *at the commencement* of the action,

all of which discriminates against the defendants herein owning an interest in the same subject matter involved by reason of the fact that they have less tran 1/4th Indian blood and in violation of the due process clause of the 5th Amendment and the 14th Amendment of the United States Constitution and that several of the defendants herein, possessing less than 1/4th Indian blood are being discriminated against by reason of the fact that they are being forced to defend their rights in federal court and in state court all because they do not have at least 1/4th Indian blood as prescribed by the acts of Congress. See *Exhibit 5 attached.*

IX.

That the appraisers were not given the appropriate instructions submitted in behalf of the clients of Robert G. Grove and Mike Smith, nor were they instructed to read the transcript of testimony in Corporation Commission hearing in case no. 35,868 which was submitted to the court for this purpose and which points out at page 34 that there remains in the reservoir a minimum of 3 billion cubic feet of native natural gas to be used as "cushion gas" only for the benefit of Transok Pipe Line Company and the instructions given to the commissioners are in violation of the due process clause of the 14th Amendment of the United States Constitution.

X.

That Transok Pipe Line Company attached no plat or plan of engineer's drawing to show what was planned for the surface and to show exactly what part of the surface would be appropriated and whether or not gas compressor stations would be placed on said land, nor was there any showing of just what paraphernalia would be placed on the surface on a permanent basis, all being essential for any appraiser to use in arriving at damages to the surface.

XI.

That while the commissioners were proceeding in this matter they did not make contact with the defendants herein or their attorneys but merely used the forms prepared and supplied by Transok Pipe Line Company and completed their appraisements and made their returns without inquiring of the defendants of values, i.e., what if the value of the interest being appropriated or what did the owner pay for said interest or what did he plan to use the property for in the future. Further the forms used by the commissioners do not comply with the requirements of 66 O. S. § 53.

XII

That by the *verbage* in the "Report of Commissioners" the plaintiff herein is appropriating all right, title and interest in and to certain fee ownership of the defendants inasmuch as the former fee owners will have reserved to them, their lessees and tenants, *ONLY* the right to use the *SURFACE* of said lands at any and all times that is not inconsistent with or interfere with or endanger the use and operation of such underground gas storage facility, all contrary to law and said appropriation is described as an "easement" when it is the taking of all fee ownership below the surface, including limestone, sand, and various other substances below the surface which belong to the fee ownership when the underground gas storage containing structure is well below —2,000 feet from the surface and the present fee owner will be denied in perpetuity all formations below the surface including the use of the channel booch sand formation. As now worded, in the future, the fee owner will not be permitted to open a limestone quary nor will he ever be permitted to use his channel booch sand in the event it is discovered that it contains uranium or is valuable for insulating material. The owners will not have the use of any formation below the surface for any purpose. 52 O.S. § 36.1 et seq. does not provide for an ease-

ment in this taking nor does the law of Oklahoma permit an easement in this type of appropriation. As evidenced by the "Gas Storage Agreement and Easement" form used by Transok Pipe Line Company in acquiring rights to store gas indicate the intent is to take fee ownership in the channel booch sand formation and the surface in perpetuity. See *Exhibit 6 attached.*

XIII.

That these proceedings are void and should not be allowed to continue as to the defendant Maxwell Darks, specifically, as he has evidenced his intent to participate as a joint-owner in the gas storage project, which would be in the public interest and allow the defendant, Maxwell Darks, to use his property constituting approximately 15% of the gas storage warehouse for its highest and best known use and allow the condemnation action to proceed, if it is a legal procedure otherwise, and to not allow this owner to use his land and participate in the gas storage warehouse project is in violation of said defendants rights under the 14th Amendment of the United States Constitution.

XIV.

That the defendants herein ask the Court to order and direct that the appraisers be present on the date this matter is set for hearing so that the commissioners can be questioned and cross-examined as to their manner and reasons in arriving at the monetary figures in this appraisement.

XV.

That the defendants herein make a request to the Court that the Court Reporter of Judge Rudolph Hargrave be present and record all proceedings on the date of the hearing on this matter and if for some reason she cannot be present, we respectfully ask that "neutral" reporter be asked to take the proceedings and that she be assigned in from another Judicial District by direction of the Court Administrator.

XVI.

That said defendant Maxwell Darks further gives notice to Transok Pipe Line Company and other parties having an interest in the subject matter herein that he will claim his right of ownership, to any gas injected under his land until the rights of said Maxwell Darks appropriated herein are finally adjudicated, or in the alternative, he will claim his right to capture any gas injected under his land until the rights of said parties hereto are finally adjudicated.

s/ Carl Michael Smith
Mike Smith, Attorney
Law Offices Robert G. Grove
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma 73102

[Certificate of Mailing omitted.]

FILED
HUGHES COUNTY
SEP 5 - 1973
LOIS MERCHANT, Court Clerk
By *Lois Merchant*
(*Em*)

IN THE DISTRICT COURT OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPELINE COMPANY	)	
Plaintiff	)	
-vs	)	No. C-73-93
Hubert Douglas, Jr.	)	
et al Defendant	)	

AMENDED EXCEPTION TO REPORT
OF APPRAISERS

COME NOW the Defendants Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Wil-

liams, Robert Martin Moran, John E. Moran Trust (No. 323) and Barbara Moran Jernigan and re-adopt each and every allegation of their exceptions to report of appraisers on file herein as if each were fully plead herein, and for further objection to said report of appraisers, state as follows:

1. That at all times material herein, appraiser A. B. Cantrell, was negotiating with Plaintiff for the purchase of natural gas from a well or wells he has completed and said facts were concealed from this court by Plaintiff at the time of his appointment.

2. That at all times material herein appraiser, Charles Moore, has been and is selling gas to Transok Pipeline Company, Plaintiff herein, and that these facts were concealed from this court by the Plaintiff at the time of the appointment of Mr. Moore.

3. Attached hereto and marked Exhibit "A" is a letter from Mr. Robert L. Lawrence, General Counsel for Plaintiff to the Honorable Fred Daugherty, United States District Judge, in regard to the condemnation proceeding by Plaintiff in federal court.

4. Attached hereto and marked Exhibit "C" is a reply letter from counsel for the above named Defendants to the Honorable Fred Daugherty.

CARL MICHAEL SMITH

Attorney for Defendants

[Certificate of Mailing omitted.]

[APPENDIX]

EXHIBIT "A"

TRANSOK
PIPE
LINE COMPANY

306 PUBLIC SERVICE BLDG.
P. O. BOX 201
TULSA, OKLAHOMA 74102

August 1, 1973

The Honorable Fred Daugherty
Judge, U. S. District Court
Federal Court House Bldg.
Oklahoma City, Oklahoma 74102

Dear Judge Daugherty:

As you requested during the course of the hearing yesterday, July 31, we have determined that this Company is not purchasing any gas from Mr. A. B. Cantrell. It is, however, negotiating with Arbac Petroleum Company. We are advised that Mr. Cantrell has an interest in this Company. Mr. Charles Moore has a royalty interest only in two small wells in Hughes County from which we purchase gas under contract with the producer.

We also find that we have existing gas purchase contracts with Victor Pryor and Gale Pryor, both of whom were suggested as possible Commissioners by Mr. Darks or by the Government.

Since the outcome of this case will have absolutely no effect upon our negotiations with Arbac Petroleum Company, or with royalty interest owners, it is our feeling that there exists no relationship which would prevent either Mr. Cantrell or Mr. Moore from being disinterested parties.

May we summarize what easement rights we are condemning.

1. The right to use the Channel Booch Sand or formation for the storage of gas.

2. Mineral owners interest in the recoverable gas remaining in the formation.

3. The right to continue to operate the wells now located on the properties and pipelines in place.

4. The specific right to construct a 16-inch pipeline crossing only Tract 5.

5. We will acquire, and pay for, in this proceeding, the right to drill additional wells or to construct additional pipelines, if same become necessary in the proper operation of the storage facility, in which event we will pay additionally, at the time of its accrual, surface damage resulting from such additional construction.

We feel that this approach is equitable both to this Company and to the present and future owners of the lands involved, inasmuch as it eliminates the necessity for paying now for some remote or speculative damage which may never occur, yet provides for payment to the then owner for any surface damage which may actually be done.

This is analogous to location damages or construction damages under oil and gas leases for the location of wells or construction of pipelines, recognized in the industry.

Yesterday we neglected to cite Oklahoma City vs. Morris, Judge, 405 P2d 1, in which the Oklahoma Supreme Court held that a condemnor cannot be required to attach to its Petition a copy of the plans and specifications of its proposed construction.

I am enclosing proposed form of Order Appointing Commissioners, Oath and Report of Commissioners with the thought that these, coupled with the explanation above may be responsive to your inquiry. Additional copies of these forms are being sent to the Court Clerk.

I am also enclosing a copy of instructions prepared by us which we believe to be in accordance with the law for whatever value they may have to you in preparing your submittal to the Commissioners.

Respectfully,

s/ *Robertlce*
Robert L. Lawrence
General Counsel

RLL:sm
Encs.

xc Honorable Fred Daugherty
Maxwell Darks
Richard A. Pyle
Carl M. Smith
Andrew Wilcoxen
U. S. Court Clerk

EXHIBIT "B"

August 7, 1973

Honorable Fred Daugherty, Judge
United States District Court for
the Western District of Oklahoma
Federal Courthouse Building
Oklahoma City, Oklahoma 73102

Re: Transok Pipeline Company
-vs- Easement and U.S.A.,
et al, United States District
Court for the Western District
of Oklahoma, No. Civ.-73-186

Dear Judge Daugherty:

I have received a copy of a letter sent to you by Mr. Robert L. Lawrence, General Counsel for Transok Pipeline Company.

It is my understanding that Mr. A. B. Cantrell is President of and principal stockholder in Arbac Petroleum Company. As to Mr. Charles Moore, I feel that Mr. Lawrence should advise the court as to any interests Mr. Moore owns in wells in counties other than just Hughes County, in which gas is sold to Transok Pipeline Company.

In addition, I have contacted Mr. Victor Pryor concerning the sale of gas by he and Mr. Gale Pryor to Transok Pipeline Company. Mr. Pryor advised that he and Mr. Gale Pryor own some mineral interest in Hughes County, Oklahoma, which had been overlooked during title search, and a division order was therefore subsequently executed allowing both Mr. Victor Pryor and Mr. Gale Pryor to receive their appropriate royalty payments. Mr. Pryor further advised that the operator chose to sell the produced gas to Transok Pipeline Company and neither he nor Mr. Gale Pryor were consulted in the decision.

I do not wish to burden the court with reply to the remainder of Mr. Lawrence's letter at this time, but will reserve response to those points raised until the appropriate time.

Very truly yours
Carl Michael Smith

CMS/ls

cc: Mr. Robert L. Lawrence
P. O. Box 201
Tulsa, Oklahoma

: Mr. Andrew Wilcoxen
P. O. Box 1842
Muskogee, Oklahoma

: Mr. Richard Pyle
United States Attorney
United States Courthouse
Muskogee, Oklahoma

FILED
HUGHES COUNTY
Oct. 31, 1974
LOIS MERCHANT, Court Clerk
By Lois Merchant

IN THE DISTRICT COURT IN AND FOR
HUGHES COUNTY, OKLAHOMA

TRANSOK PIPE LINE COMPANY a corporation,	)	
PLAINTIFF,	)	
vs	)	CAUSE NO.
	)	C-73-93
MAXWELL DARKS,	)	
DEFENDANT.	)	

TEMPORARY RESTRAINING ORDER

This matter coming on for hearing before the undersigned District Judge in and for the above named Court, upon the application and affidavit of the plaintiff by and through its attorney of record, and it appearing to the Court that upon the facts alleged in said application the plaintiff is entitled to the relief prayed for, and it further appearing that the said plaintiff will suffer irreparable damage and harm and injury unless the said defendant is enjoined and restrained forthwith and without notice: IT IS HEREBY ORDERED AND ADJUDGED that the said defendant, Maxwell Darks, his agents, servants, and all persons acting by or under his authority be, and they are hereby enjoined and restrained from carrying out the written threats of defendant conveyed to plaintiff, from interfering with the plaintiff, its employees, agents, and servants in connection with their employment on behalf of this plaintiff, and from preventing the plaintiff through its employees, agents and servants from going upon the land described in the petition on file herein and carrying out their legitimate duties thereon until the further order of this Court.

IT IS FURTHER ORDERED that the application of plaintiff for a permanent injunction is hereby set for hear-

ing at 10:00 o'clock A.M., on the 24th day of October, 1974, at the District Court room in the City of Holdenville, County of Hughes, and that notice thereof be given to the said defendant at least 5 days prior to said hearing.

s/ Rudolph Hargrave
Judge of the District Court

SHERIFF'S RETURN

STATE OF OKLAHOMA,
OKLAHOMA COUNTY, SS.

[Acknowledgment of Summons not served on Maxwell Darks by Joe B. Ray, Deputy. No date appears thereon. General text of the Summons omitted.]

I, LOIS MERCHANT, Court Clerk for Hughes County, Oklahoma, hereby certify that the foregoing, is a true, correct, and complete copy of the instrument herewith set out as appears of Record in the Court Clerk's Office of Hughes County, Oklahoma

This 3rd day of March, 1975
s/ *Lois Merchant* Court Clerk
By Deputy

FILED
HUGHES COUNTY
DEC 17 1974
LOIS MERCHANT, Court Clerk
By *Lois Merchant*
(*Em*)

IN THE DISTRICT COURT IN AND FOR
HUGHES COUNTY, STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A CORPORATION,
PLAINTIFF,

-vs- No. 73-93

MAXWELL DARKS, ET. AL.,
DEFENDANTS

AFFIDAVIT

STATE OF OKLAHOMA
COUNTY OF OKLAHOMA

I, the undersigned defendant in this case, do state that I received a letter from Transok Pipe Line Company on or about October 11, 1974, a copy of which is set out below.

TRANSOK
PIPE LINE
COMPANY

2900 First Tower
P. O. Box 201
Tulsa, Oklahoma 74102

October 9, 1974

Mr. Maxwell Darks
1601 Southwest 77th St. Terrace
Oklahoma City, Oklahoma 73159

Dear Sir:

You, as an attorney, are or should be aware that this company's condemnation proceedings against you and certain of your property in Hughes County have been completed in compliance with the statutory requirements pertinent to such proceedings and have progressed to the point at which this company is, under the law, entitled to possession for its proper purposes. You also are aware that the proposed removal of our facilities as suggested in your mailgram of October 8 would constitute the commission of a felony.

Please be advised that if you should institute such removal activities or in any manner damage this company's property as you have suggested you may do, and in the doing thereof violate the felony statutes we will promptly file appropriate charges and prosecute them to conclusion.

Yours very truly,
s Charles B. Crane
Charles B. Crane,
Attorney

CBC: lar

I further state that after receipt of this letter Transok Pipe Line Company obtained a Restraining Order against me although I had not and could not receive temporary compensation of any kind.

s/ Maxwell Darks

Subscribed and sworn to before me this 16 day of December, 1974. My commission expires 3-7-75.

[signature illegible]

[S E A L]

[Certificate of Mailing omitted.]

FILED
HUGHES COUNTY
NOV 22 1974
LOIS MERCHANT, Court Clerk
By *Lois Merchant*
(Em)

IN THE DISTRICT COURT WITHIN AND FOR HUGHES COUNTY, STATE OF OKLAHOMA

TRANSOK PIPELINE CO., PLAINTIFF,	*	
VS.	*	No. C-73-93
HUBERT DOUGLAS, JR., ET AL., DEFENDANTS.	*	

ORDER

Now on this 21st day of November, 1974, the Court having on October 24, 1974, heard several matters pending in the above cause and after taking said matters under advisement and careful consideration of all of the pleadings together with statements of counsel and the law, no evidence having been presented, finds as follows:

(1) Defendant's election to participate over ruled.

(2) Defendant's motion to set aside appointment of appraisers over ruled.

(3) Defendant's request for competitive bidding over ruled.

(4) Defendant's amended exceptions to report of commissioners over ruled.

(5) Defendant's motion to dismiss and request for permanent injunction over ruled.

(6) Defendant's motion to dismiss over ruled.

(7) Plaintiff's motion to strike motion to dismiss sustained.

(8) Defendant's motion for memorandum of interest sustained insofar as any prepared information setting out interest of ownership in the hands of the plaintiff which may be furnished for the Court's benefit in determining the interest herein.

(9) Defendant's exception to commissioners report over ruled.

(10) Plaintiff's motion to approve report of commissioners and to confirm taking in condemnation is sustained.

(11) Defendant's application for temporary restraining order and injunction over ruled.

(12) Plaintiff's exceptions and objections to commissioners report are denied and in this connection, the Court specifically finds that the partial dismissal filed by the plaintiff is ineffectual and that the defendant, Harry H. Diamond Inc., is a necessary party to these proceedings.

(13) The Court further orders the plaintiff to deposit with the Court Clerk of Hughes County, Oklahoma, the amount of damages as set out by the commissioners in their

BLEED THROUGH

report in favor of the defendant, Harry H. Diamond, Inc., within 20 days from this date.

The Clerk is instructed to make a minute reflecting these rulings and allowing each side exceptions to the Court's rulings.

s/ Rudolph Hargrave
RUDOLPH HARGRAVE
DISTRICT JUDGE

APPENDIX E

JULY TERM — August 15, 1975

Before Honorable Delmas C. Hill, Honorable William J. Holloway, Jr., and Honorable William E. Doyle, Circuit Judges

MAXWELL DARKS,	)	
Petitioner,	)	
vs.	)	
	)	No. 75-1587
HONORABLE JOSEPH W. MORRIS, Judge of the United States District Court for the Eastern District of Oklahoma,	)	
Respondent.	)	

This matter comes on for consideration of a petition for writ of prohibition.

Upon consideration whereof, it is ordered that the petition is denied.

HOWARD K. PHILLIPS
Clerk

By: s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By
[signature illegible]
Deputy Clerk

BLEED THROUGH

APPENDIX F

FILED
October 26, 1973
CHARLES N. HASKELL
Clerk, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, An Oklahoma Corporation,	)	
-vs-	)	
	)	No. Civil-73-186
AN EASEMENT, ETC., HUGHES COUNTY OKLAHOMA, U.S.A., MAXWELL DARKS, et al	)	

EXCEPTION TO COMMISSIONERS REPORT

COMES NOW Robert G. Grove and Carl Michael Smith, attorneys for the Defendants Maxwell Darks and P. G. Parks and take exception to the reports of the Commissioners herein for the following reasons:

I

That Transok Pipe Line Company produces and transports natural gas, a part of which is transported in interstate commerce under 15b United States Code, Section 717 (a) and before any type of preparing, erecting, maintaining, or operating of a gas storage warehouse, can be commenced the Plaintiff herein must first follow the requirements of the law set out in 15B United States Code, Section 717c and 717f. Plaintiff herein did not follow the law in these sections and has not obtained a certificate of convenience and necessity from the Federal Power Commission as is required before any action can be commenced relative to this project.

II

That the proceedings before the Corporation Commission of the State of Oklahoma to obtain a certificate as a condition precedent to commencing this action in Case No. 35,868 are void by reason of "1" above and for the further reason that the orders previously issued in the case were not based on the findings of fact of the trial examiner, in that numerous rulings therein are contrary to and not authorized by the law of Oklahoma nor the Fourteenth Amendment of the United States Constitution.

III

That the Commissioners herein were appointed under 66 Oklahoma Statutes § 53 and are not qualified to assess the fair market value of this land, gas storage warehouse, and minerals for the purpose of underground gas storage in that the procedure prescribed is for appraisement of railroad right-of-way, which in no way fits the necessary formula to be used to arrive at the fair market value of a "unique" and "novel" value of land i.e., a subsurface gas storage warehouse facility and said procedure is in violation of the Fourteenth Amendment of the United States Constitution. The method prescribed for determining damages in no way determines the damage or fair market value of this subsurface fee ownership which is described in 60 Oklahoma Statutes § 64. The fair market value of an underground gas storage warehouse could only be determined by petroleum engineers with the expertise to arrive at the fair market value. In fact, no value was even considered for the subsurface gas storage warehouse but only damage to the surface of the fee ownership and a gas royalty in the oil and gas leasehold estates which lease terminated when production of gas closed.

IV

That the fair market value of the remaining native natural gas in the channel booch sand formation was computed by the Commissioners on an One-Eighth Royalty

BLEED THROUGH

basis on an unknown amount of gas since the amount was not given to the Commissioners in the instructions. Commissioners returned an amount, based on the 1955 price of gas for a One-Eighth royalty instead of current market prices based on Eight-Eighths ownership of the gas in place in the Channel Booch formation on not less than three billion cubic feet remaining in the reservoir as set out in the testimony of the Corporation Commission's Case No. 35,868 which allows Transok Pipe Line Company to appropriate without compensation to the mineral owners $1,800,000.00 of gas based on the current market price.

V

That Transok Pipe Line Company attached no plat or plan or engineers drawing to show what was planned for the surface and to show exactly what part of the surface would be appropriated and whether or not gas compressor stations would be placed on said land, nor was there any showing of just what paraphernalia would be placed on the surface on a permanent basis, all being essential for any appraiser to use in arriving at damages to the surface. Later, if they need to appropriate all of the surface for the gas storage project, the owners will be barred from receiving additional compensation. There is no showing of where pumping stations and paraphernalia will be placed, now, or in the future.

VI

That while the Commissioners were proceeding in this matter they did not make contact with the Defendant herein or their attorneys but merely used the form prepared and supplied by Transok Pipe Line Company and completed their appraisements and made their returns without inquiring of the Defendants of values, i.e., what was the value of the interest being appropriated in the surface, underground gas storage warehouse, and mineral value. Further the forms used by the Commissioners do not comply with the requirements of Title 66 Oklahoma Statutes § 53.

VII

That by the *verbage* in the "Report of Commissioners" the Plaintiff herein is appropriating all right, title and interest in and to certain fee ownership of the Defendant inasmuch as the former fee owners will have reserved to them, their lessees and tenants, only the right to use the SURFACE of said lands at any and all times that they are not inconsistent with or interfere with or endanger the use and operation of such underground gas storage facility, all contrary to law. That the said appropriation is described as an "easement" when it is in fact and law, the taking of all fee ownership below the top of the formation including limestone, sand, and various other substances. As now worded, the Defendant will not be permitted to open a limestone quary nor will they ever be permitted to use their portion of the channel booch sand in the event, for example, it is discovered that it contains uranium or other valuable material. The Defendants will not have the use of any formation below the surface for any purpose. 52 Oklahoma Statutes § 36.1 et. seq. does not provide for an easement in this taking nor does the law of Oklahoma permit an easement in this type of appropriation as set out in 60 Oklahoma Statutes § 49.

VIII

That these proceedings are void and should not be allowed to continue as to the Defendant Maxwell Darks, specifically, as he has evidenced his intent to participate as a joint owner in the gas storage project, and has also evidenced his desire to bid on the interest of the restricted Indians included herein at competitive bidding as authorized by public law 336 passed in 1947, being a violation of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and all other pertinent state and federal laws.

BLEED THROUGH

IX

That at all times material herein appraiser C. A. Moore has been and is selling gas to Transok Pipe Line Company, Plaintiff herein individually or as the owner of stock in corporation, thereby disqualifying him as a Commissioner herein.

X

That the Commissioners appointed herein failed to follow the instructions of this court in appraising the involved real property and making their report, but followed the same instructions followed in Hughes County District Court cases wherein C. A. Moore and Binas Hostettler were appraisers in companion cases pertaining to the same subject matter herein all contrary to law.

XI

That the Defendants herein ask the court to order and direct that the Commissioners be present on the date this matter is set for hearing so that the Commissioners can be questioned and cross-examined as to their manner and reasons in arriving at the monetary figures in this appraisement.

XII

That the procedure for condemnation under Oklahoma law is unconstitutional under the Fifth and Fourteenth Amendment of the United States Constitution inasmuch as it allows the condemnor to own and take possession of the property in question before the legal proceeding for condemnation is completed or any compensation is paid to the owner and places the burden of litigation on the landowner.

XIII

That said Defendant Maxwell Darks further gives notice to Transok Pipe Line Company and other parties having an interest in the subject matter herein that he will claim his right of ownership to any gas injected under his land

until the rights of said Maxwell Darks appropriated herein are finally adjudicated, or in the alternative, he will claim his right to capture any gas injected under his land until the rights of said parties hereto are finally adjudicated.

XIV

That said Transok Pipe Line Company has no right to be on the land which is the subject of this litigation, they being, trespassers by reason that when they stopped producing gas their lease terminated by its own terms.

XV

That this court should remove all cases now pending, described in previous pleadings herein, from the District Court of Hughes County Oklahoma, to this court by reasons heretofore set out.

s/ Carl Michael Smith
CARL MICHAEL SMITH
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

[Certificate of Mailing omitted.]

FILED
NOV 16 1973
CHARLES N. HASKELL
Clerk, U. S. District Court
By .....
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation, Plaintiff,	)	
-vs-	)	
	)	Case No. 73-186
An easement for the preparation, use and operation of a gas storage facility	)	Civil

BLEED THROUGH

in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma)

AND)

The United States of America, et al., Defendants.)

ORDER

Upon consideration of the Exception to Commissioners Report filed herein by the Defendants Maxwell Darks and P. G. Parks, the Court finds that the same should be overruled and the Report of Commissioners filed herein on October 1, 1973 should be confirmed.

The Court has previously ruled adversely to the above Defendants on many of said exceptions and need not rule again on the same. The other exceptions are deemed to be without merit. The Commissioners were qualified to act as such and followed the Court's instructions. The Court will conduct no hearing on said Report of Commissioners. The Oklahoma condemnation procedure is not unconstitutional but affords due process of law and the equal protection of the laws in all respects.

It is so ordered this 16th day of November, 1973.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

FILED
DEC 31 1975
CHARLES N. HASKELL
Clerk, U. S. District Court
By
Deputy Clerk

FOR THE EASTERN DISTRICT OF OKLAHOMA
IN THE UNITED STATES DISTRICT COURT

TRANSOK PIPE LINE CO., Plaintiff,	)	
-vs-	)	No. 73-186-C
AN EASEMENT, etc., Defendants.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL

This is a condemnation case. The sole question for the jury was to determine the just compensation to be awarded the landowners with respect to the surface and mineral interests in four different tracts of land. This Court has previously determined that the interest being taken by plaintiff pursuant to 52 O. S. 36.1 et seq. is an easement for the underground storage of natural gas in the Channel Booch formation. There has been a legal severance of the mineral interest in each of the tracts of land involved and accordingly it was necessary for the jury to make a determination of the just compensation due to the mineral interest owners and to the surface interest owners separately. The respective tract owners, the nature of their interest, the size of the tract, and the just compensation awarded by the jury are as follows:

Tract 1—Maxweil Darks
Undivided 1/2 interest in the surface of an 80 acre tract—
$12,000.00

BLEED THROUGH

Tract 2—Maxwell Darks
Surface interest owner in an 80 acre tract—
$32,000.00

Tract 3—P. G. Parks
Undivided 1/2 mineral interest owner in an 80 acre tract
$520.00

Tract 6—Marvin Olivo
Surface interest owner in a 160 acre tract
$48,000.00

Tract 6—Marvin Olivo
Undivided 1/24 mineral interest owner in a 160 acre tract
$205.00

The plaintiff has filed a motion for new trial setting forth nine grounds. One of the grounds is that "the verdicts of the jury are excessive in each instance, except as to the minerals, and appear to have been given under the influence of prejudice." The defendants Darks, Parks and Olivo have filed a response to the motion.

The defendant Darks has filed a motion for a new trial setting forth three grounds for the motion, each of which goes to the proper measure of damages. The plaintiff and the defendant Olivo have each responded to the defendant Darks' motion for a new trial. The defendants Parks and Olivo have not filed motions for a new trial.

Prior to the trial the Court ruled that the proper measure of damages with respect to a surface interest owner is to be determined by ascertaining the difference between the fair market value of each tract of land immediately before and immediately after it is burdened by the easement for underground gas storage and so instructed the jury that such was the proper measure of damages. For the jury's assistance the Court also submitted summaries of the evidence with respect to the surface interests in

Tracts 1, 2 and 6 and advised the jury that the verdicts as to each tract must fall within the ranges of just compensation as shown by the summaries. The summaries are attached hereto as Exhibit 1. The just compensation awarded the surface interest owners by the jury was as follows:

Tract 1:	$12,000.00
Tract 2:	$32,000.00
Tract 6:	$48,000.00

The interest being taken by the plaintiff is an easement whereby it is granted the right to store gas in the Channel Booch sand formation found in and under each of the above mentioned tracts. That formation is approximately 60 feet thick, lies at a depth of approximately 2500 feet below the surface and underlays approximately 3650 acres of land in Hughes County. Natural gas will be injected into this reservoir and will occupy the pore space in the sand which was once productive of dry gas and has been found by the Corporation Commission to be ideally suited for the underground storage of natural gas. The defendant surface owners of such tracts will be permitted to continue to use their land and the evidence is unequivocally clear that they have used their land for whatever purpose they see fit, including pasture, farming, grazing, etc. Furthermore, under the terms of the taking, the plaintiff is obligated to pay the surface owners for all damages to growing crops, timber, fences and improvements occasioned by any future construction of pipelines, the drilling of wells, or other acts of the plaintiff in exercising its rights under the easement.

Based upon the evidence adduced and the full range of uses which the surface owner defendants continue to have with respect to the surface tracts in question, the Court concludes that the damages or just compensation awarded by the jury in this case are grossly excessive. The Court is well aware of the fact that the range of "before and after" values as presented by the defendants and

BLEED THROUGH

as presented by the plaintiff represented the ultimate in extremes. The plaintiff adduced testimony that there was no diminution in value occasioned by the easement; the defendants adduced testimony that the imposition of the easement upon these surface tracts reduced their value to zero. In the Court's view both of these positions totally defy all practical realism and if the jury had found the just compensation to have been at or near the zero end of the spectrum, the Court would have concluded, based upon the evidence adduced at the trial, such an award to have been grossly inadequate.

Rule 59 of the Federal Rules of Civil Procedure provides in part as follows:

> "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . ."

The Tenth Circuit and other circuits have recognized time and time again that when the trial judge concludes, based upon all the evidence adduced, that the damages awarded are excessive, he may, in the interest of justice, grant a new trial. In *Holmes* v. *Wack*, 464 F.2d 86 (10th Cir. 1972) the Tenth Circuit approved the action of the trial judge in granting a new trial because of the excessiveness of the verdict and stated:

> "First, we consider the trial court's action in granting a new trial following the verdict in favor of the plaintiff at the first trial. The granting or refusal to grant a motion for new trial is governed by Rule 59 of the Federal Rules of Civil Procedure which embodies the common law precedents of the English and federal courts. Thus, state procedure is not applicable. See 6A Moore's Federal Practice Par. 59.05. The scope and extent of this power to grant a new trial is well de-

scribed in the oft-cited opinion of the Fourth Circuit (opinion by Judge Parker) in Aetna Casualty & Surety Co. v. Yeatts, 122 S.2d 350 (4th Cir. 1941), wherein the late Judge Parker pointed out that a federal trial judge has ample power to see that justice is done, and where the ends of justice require it he has the authority to set aside the jury's verdict. Furthermore, where the trial court believes that the jury's verdict is against the weight of the evidence, a motion for new trial is proper. And where the court believes that the judgment for damages is excessive, that is, it is against the weight of the evidence, the court may order a remittitur and alternatively direct that there be a new trial if the plaintiff refuses to accept it.

"In the instant case the court was of the opinion that the verdict was excessive and said so." 464 F.2d at 88-89

This rule has been followed by many courts and it is recognized by the authorities that granting a new trial under such circumstances is a proper discretionary determination by a trial judge. 6A *Moore's Federal Practice*, Par. 59.05[5].

The defendant Darks, in his motion for new trial and in his brief, argues that this court erred in refusing to permit him to introduce evidence concerning damages caused by plaintiff in entering upon Tracts 1 and 2 prior to April 5, 1973. He argues that the Supreme Court of Oklahoma has entered an order prohibiting the prosecution of a separate action brought by him in state court for the recovery of these damages, the court saying that such damages must be recovered by him in connection with the condemnation proceeding. In support of this argument he attaches as Exhibits A and B the orders, pleadings and briefs filed in the Oklahoma Supreme Court. The orders in those cases prohibit the further prosecution of an action filed by defendant Darks in state court on November 26, 1974. The writ of prohibition issued by the Oklahoma Supreme Court in each

BLEED THROUGH

of two cases was filed on September 8, 1975. Defendant Darks also attaches as Exhibit C an affidavit wherein he sets out the alleged wrongful acts of the plaintiff which presumably form the basis for the action filed by him in state court on November 26, 1974.

Examination of the four cases cited by the Oklahoma Supreme Court in its orders granting writs of prohibition reveals that the court has held that damages which are caused *incident to a taking* in an eminent domain proceeding must be recovered in that proceeding. See *Delhi Gas Pipe Line Co.* v. *Swanson*, 520 P.2d 670 (1974); *Oklahoma City* v. *Wells*, 185 Okl. 369, 91 P.2d 1077 (1939); *Cities Service Gas Co.* v. *Heubner*, 200 Okl. 521, 197 P.2d 985 (1948), and *Graham* v *The City of Duncan*, 354 P.2d 458 (1960). In each of those cases, however, the damages for which plaintiff seeks to recover occurred in connection with the taking of the land in question. For example, in *Graham* v. *The City of Duncan*, *supra*, the court noted: ". . . the broomcorn was appropriated by the city in connection with the taking of the land upon which it was grown. . . ." 354 P.2d at 463. Such is not the case here. In this case the taking occurred on October 1, 1973. All of the acts of which defendant Darks complains occurred not in connection with the taking, but in fact occurred some five months prior to the taking. The foregoing cases do not stand for the proposition that in such a circumstance all such damages must be recovered in the condemnation action. Furthermore, Exhibits A and B attached to defendant Darks' motion for new trial show that there were pending and are pending in state court several condemnation proceedings with respect to several tracts which make up a part of defendant Darks' ranch. It appears that these condemnation proceedings were instituted in 1973 the takings occurred prior to the taking in this case. The Supreme Court of Oklahoma apparently concluded, in accord with the rule of law announced in the authorities mentioned above, that the action filed by defendant Darks on November 26, 1974, involved

damages to land which were caused in connection with one or more of the condemnation proceedings pending in state court, and for that reason it issued the writ of prohibition. The pendency of this case was not mentioned in the Supreme Court's writ or in the pleadings.

For the reasons heretofore stated, the plaintiff's motion for new trial is granted with respect to the surface interests only of defendants Darks and Olivo in Tracts 1, 2 and 6. The defendant Darks' motion for new trial is denied.

ORDERED this 31 day of December, 1975.

s/ Joseph W. Morris
United States District Judge

SUMMARY — TRACT 1 — SURFACE INTEREST

MAXWELL DARKS, LANDOWNER

Unit Owned:	Undivided 1/2 interest in 80 acres (i.e., 40 acres)
Property Interest Taken:	Easement for underground gas storage purposes in undivided 1/2 interest in 80 acres (i.e., 40 acres) and the continuing right to enter upon and use surface for purposes of preparing, examining, maintaining and operating the underground natural gas storage area.

WITNESSES FOR LANDOWNER

	Value Before Taking	Value After Taking	Just Compensation
Maxwell Darks	$700 per acre ($28,000 for a 1/2 interest)	No. figure given	Not Determinable
Victor W. Pryor, Jr.	$12,000	$0	$12,000

BLEED THROUGH

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value Before Taking	Value After Taking	Just Compensation
Rolley Caplinger	$6,000	$6,000	$ 0

SUMMARY — TRACT 2 — SURFACE INTEREST

MAXWELL DARKS, LANDOWNER

Unit Owned: 80 acres

Property Interest Taken: Easement for underground gas storage purposes in 80 acres and the continuing right to enter upon and use surface for purposes of preparing, examining, maintaining and operating the underground natural gas storage area.

WITNESSES FOR LANDOWNER

	Value Before Taking	Value After Taking	Just Compensation
Victor W. Pryor, Jr.	$38,500	$ 0	$38,500

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value Before Taking	Value After Taking	Just Compensation
Rolley Caplinger	$10,000	$10,000	$ 0

SUMMARY — TRACT 3 — MINERAL INTEREST

P. G. PARKS, OWNER

Unit Before Taking: 1/8 royalty interest in 1/2 of the economically recoverable gas reserves under tract

Property Interest Taken:	The economically recoverable gas reserves under tract in the Channel Booch Sand Formation.

WITNESS FOR OWNER

	Value on Date of Taking	Just Compensation of Reserves Taken
Victor W. Pryor, Jr.	$520.00	$520.00 (Parks' interest)

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value on Date of Taking	Just Compensation of Reserves Taken
C. H. Keplinger	$145.00	$145.00 (Parks' interest)

SUMMARY — TRACT 6 — SURFACE INTEREST

MARVIN OLIVO, LANDOWNER

Unit Owned:	160 acres
Property Interest Taken:	Easement for underground gas storage purposes in 160 acres and the continuing right to enter upon and use surface for purposes of preparing, examining, maintaining and operating the underground natural gas storage area.

WITNESS FOR LANDOWNER

	Value Before Taking	Value After Taking	Just Compensation
Marvin Olivo	$48,000	$1,600	$46,400
Victor W. Pryor, Jr.	$61,500	$ 0	$61,500

BLEED THROUGH

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value Before Taking	Value After Taking	Just Compensation
Rolley Caplinger	$24,000	$24,000	$ 0

SUMMARY — TRACT 6 — MINERAL INTEREST

MARVIN OLIVO, LANDOWNER

Unit Before Taking: 1/8 royalty interest in 1/24 of the economically recoverable gas reserves under tract.

Property Interest Taken: The economically recoverable gas reserves under tract in the Channel Booch Sand Formation.

WITNESS FOR OWNER

	Value on Date of Taking	Just Compensation of Reserves Taken
Victor W. Pryor, Jr.	$205.00	$205.00 (Olivo's interest)

WITNESSES FOR TRANSOK PIPE LINE COMPANY

	Value on Date of Taking	Just Compensation of Reserves Taken
C. H. Keplinger	$58.00	$58.00 (Olivo's interest)

APPENDIX G

(Seal)

UNITED STATES DEPARTMENT OF THE INTERIOR

GEOLOGICAL SURVEY
WASHINGTON, D.C. 20242

Mr. Maxwell Darks
1601 Southwest 77 Terrace
Oklahoma City, Oklahoma 73559

Dear Mr. Darks:

Your telegram of June 18 advises that you are interested in bidding on the gas storage rights under certain Indian lands in Hughes County, Oklahoma. You further advise that Transok Pipeline Company is also interested in obtaining these same storage rights and that it is now engaged in negotiations with officials of the Department of the Interior in an effort to secure said rights. The opinion is offered that Title 25, Code of Federal Regulations (Indian), requires condemnation action before fee ownership in Indian lands may be conveyed. Your telegram also states that you desire to enter into competitive bidding for the right to purchase the storage rights beneath these Indian lands.

Our Area Oil and Gas office, Tulsa, Oklahoma, has advised us that since early 1971, Transok has been negotiating with the Bureau of Indian Affairs, Area office, Branch of Realty, Muskogee, Oklahoma, regarding a gas storage agreement in Hughes County, Oklahoma. It is our understanding that the Oklahoma Corporation Commission, on January 17, designated the area as being logical for the use of gas storage project and that Transok and the Bureau of Indian Affairs are still in the negotiation stages. The latest meeting between the Bureau of Indian Affairs and Transok was scheduled for July 14.

BLEED THROUGH

Therefore, it is suggested that you contact the aforementioned Bureau of Indian Affairs office concerning your interest in the gas storage area and your desire to enter into competitive bidding for the gas storage rights.

Sincerely yours,

s/ Henry W. Creller
Acting Director

(Seal)

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS
MUSKOGEE AREA OFFICE
MUSKOGEE, OKLAHOMA 74401

In Reply Refer to:
Real Property Management
Acq. & Disp.

Jan. 21, 1976

Mr. Maxwell Darks
313 Southwest 103 St.
Oklahoma City, OK 73139

Dear Mr. Darks:

In Cause No. CD 35868, the Corporation Commission of the State of Oklahoma issued its order No. 96291 dated March 5, 1973, finding among other things that the Channel Booch formation underlying certain lands in Hughes County, Oklahoma, is ideally suitable for underground storage of natural gas. This order was not approved by the Secretary of the Interior or his duly authorized representative.

Sincerely yours,

s/ Allan R. Tedwall
Deputy Area Director

APPENDIX H

(1) Due process clause, Amendment V, Constitution of the United States, U.S.C.A. Constitutional Amendment V, p. 4

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) Equal protection and due process clause, Amendment XIV, Constitution of the United States, U.S.C.A. Constitutional Amendment XIV, p. 33

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

BLEED THROUGH

15 U.S.C. NATURAL GAS §717 (c) and (h)
15 U.S.C.A. §141, pp. 384, 385, 386

§ 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or

sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of such application the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under the rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be

BLEED THROUGH

in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is

unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459.

Art. 2, Constitution of Oklahoma

Bill of Rights, O.S.A. Constitution, Art. I, p. 425

§ 6. Courts of justice open—Remedies for wrongs—Sale, denial or delay

The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

Art. 2, Constitution of Oklahoma

Bill of Rights, O.S.A. Constitution, Art. I, p. 425

§ 7. Due process of law

No person shall be deprived of life, liberty, or property, without due process of law.

BLEED THROUGH

Art. 2, Constitution of Oklahoma

Bill of Rights, O.S.A. Constitution, Art. I, p. 428

§ 23. Private property—Taking or damaging for private use

No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law.

Art. 2, Constitution of Oklahoma

Bill of Rights, O.S.A. Constitution I, pp. 428, 429

§ 24. Private property—Public use—Character of use a judicial question

Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without

the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

Art. 2, Constitution of Oklahoma
Bill of Rights, O.S.A. Constitution I, p. 430

§ 32. Perpetuities—Monopolies—Primogeniture—Entailments

Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

Art. 7, Constitution of Oklahoma, O.S.A. Constitution V, p. 207

COURTS Art. 7, § 1

IN GENERAL

§ 1. Courts in which judicial power vested

The judicial power of this State shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, District Courts, County Courts, Courts of Justices of the Peace, Municipal Courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law.

Art. 7, Constitution of Oklahoma, O.S.A. Constitution V, p. 216

§ 2. SUPREME COURT—APPELLATE JURISDICTION—ORIGINAL JURISDICTION—WRITS

The appellate jurisdiction of the Supreme Court shall be co-extensive with the State, and shall extend to all civil cases at law and in equity, and to all criminal cases until a

BLEED THROUGH

Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs, as may be provided by law, and to hear and determine the same; and the Supreme Court may exercise such other and further jurisdiction as may be conferred upon it by law. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State upon petition by or on behalf of any person held in actual custody and make such writs returnable before himself, or before the Supreme Court, or before any District Court, or Judge thereof, in the State."

Art. 9, Constitution of Oklahoma, O.S.A. Constitution V, p. 356

CORPORATION COMMISSION

§ 15. Creation—Terms of office—Vacancies

A Corporation Commission is hereby created, to be composed of three persons, who shall be elected by the people at a general election for State officers, and their terms of office shall be six years: Provided, Corporation Commissioners first elected under this Constitution shall hold office as follows: One shall serve until the second Monday in January, nineteen hundred and nine; one until the second Monday in January, nineteen hundred and eleven; and one until the second Monday in January nineteen hundred and thirteen; their terms to be decided by lot immediately after they shall have qualified. In case of a vacancy in said office, the Governor of the State shall fill such vacancy by appointment until the next general election, when a successor shall be elected to fill out any unexpired term.

Art. 9, Constitution of Oklahoma, Corporation Commission
O.S.A. Constitution V, pp. 357, 358

§ 16. Qualifications of commissioners

The qualifications of such commissioners shall be as follows: To be resident citizens of this State for over two years next preceding the election, and qualified voters under the Constitution and laws, and not less than thirty years of age; nor shall such commissioners, or either of them, be, directly or indirectly, interested in any railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line, operated for hire, in this State, or out of it, or any stock, bond, mortgage, security, or earnings of any such railroad, street railway, traction line, canal, steam boat, pipe line, car line, sleeping car line, car association, express line, telephone or telegraph line, compress or elevator companies; and if such Commissioner shall voluntarily become so interested, his office shall become vacant; and if any Corporation Commissioner shall become so interested otherwise than voluntarily, he shall, within a reasonable time, divest himself of such interest; and failing to do this, his office shall become vacant. Nor shall any such commissioner hold any other office under the government of the United States, or of this State, or any other state government, and shall not, while such Commissioner, engage in any occupation or business inconsistent with his duties as such commissioner.

Art. 9, Constitution of Oklahoma, Corporation Commission
O.S.A. Constitution V, pp. 358, 359

§ 18. Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers

The Commission shall have the power and authority and be charged with the duty of supervising, regulating

BLEED THROUGH

and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. The Commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by

name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week, for four consecutive weeks, in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time, and in the manner above specified, before it shall go into effect, and shall also, so long as it remains in force, be published in each subsequent annual report of the Commission. The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of

BLEED THROUGH

charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

Art. 9, Constitution of Oklahoma, Corporation Commission, O.S.A. Constitution V, pp. 398, 399

§ 19. Powers of court of record—Additional powers—Failure or refusal to obey orders

In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be

prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense: Provided, That should the operation of such order or requirement be suspended, pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

Art. 9, Constitution of Oklahoma, Corporation Commission, O.S.A. Constitution V, pp. 403, 404

§ 20. Appeals to Supreme Court—Other courts to have no jurisdiction—Mandamus and prohibition

From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected or by any person deeming himself aggrieved by any such action, or by the State, directly to the Supreme Court of the State of Oklahoma, in the man-

BLEED THROUGH

ner and in the same time in which appeals may be taken to the Supreme Court from the District Court, except that such an appeal shall be of right, and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the public utility or public service corporation affected by any such action, the State of Oklahoma shall be made the appellee, but in other appeals hereunder, the public utility or public service corporation affected shall be made the appellee.

An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities, or public service corporations, shall be to the Supreme Court only, and in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation Commission, and the Attorney General, or his duly authorized representative.

The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment, either affirming or reversing the order of the Commission appealed from.

No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of

public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer. As amended, Laws 1941, p. 544, § 1.

52 O.S., GAS COMPANIES AND PIPE LINES—52 O.S.A. pp. 31, 32

UNDERGROUND STORAGE OF GAS

Cross References

Misappropriation of gas, see sections 234 and 235 of this title.
Taking gas, see Title 21, Crimes and Punishments, § 1722.

§ 36.1 Definitions

As used in this Act[1] (a) "underground storage" shall mean storage in a subsurface stratum or formation of the earth; (b) "natural gas" shall mean gas either while in its original state or after the same has been processed by removal therefrom of component parts not essential to its use for light and fuel; (c) "native gas" shall mean gas which has not been previously withdrawn from the earth; (d) "natural gas public utility" shall mean any person, firm or corporation authorized to do business in this State and engaged in the business of transporting or distributing natural gas by means of pipe lines into, within or through this State for ultimate public use; (e) "commission" shall mean the State Corporation Commission.
Laws 1951, p. 134, § 1, eff. May 26, 1951.

52 O.S.A., pp. 32, 33

§ 36.2 Public interest and welfare

The underground storage of natural gas which promotes conservation thereof, which permits the building of

BLEED THROUGH

reserves for orderly withdrawal in periods of peak demand, which makes more readily available our natural gas resources to the domestic, commercial and industrial consumers of this State, and which provides a better year-round market to the various gas fields, promotes the public interest and welfare of this State.

Therefore in the manner hereinafter provided the commission may find and determine that the underground storage of natural gas as hereinbefore defined is in the public interest.

Laws 1951, p. 134, § 2, eff. May 26, 1951.

52 O.S.A., pp. 33, 34

§ 36 3 Condemnation of subsurface stratum or formation—Operation of storage facilities—Limitations

Any natural gas public utility may condemn for its use for the underground storage of natural gas any subsurface stratum or formation in any land which the commission shall have found to be suitable and in the public interest for the underground storage of natural gas, and in connection therewith may condemn such other interests in property as may be required adequately to examine, prepare, maintain and operate such underground natural gas storage facilities; provided, however, that the right of condemnation of underground sands, formations and strata, granted hereby, shall be limited as follows:

(a) No sand, formation, or stratum which is producing or which is capable of producing oil in paying quantities, through any known recovery method, shall be subject to appropriation hereunder;

(b) No gas bearing sand, formation, or stratum shall be subject to appropriation hereunder, unless the volumes of native gas originally in place therein shall be shown to be substantially depleted, and that such sand, formation or stratum has a greater value or utility as a gas storage reser-

voir for the purpose of insuring an adequate supply of natural gas for any particular class or group of consumers of natural gas, or for the conservation of natural gas, than for the production of the relatively small volumes of native gas which will remain therein, provided that no gas sand, formation or stratum shall be condemned under the terms of this Act[1] when the gas therein is being used for the secondary recovery of oil, unless gas in necessary and required amounts is furnished to the operator or operators of the secondary recovery operations for as long as oil is produced in paying quantities in the secondary operations for the recovery of oil at the same cost as that at which the gas was being produced at the time of condemnation by the operator of the secondary recovery project or projects.

(c) Only such area of such underground sand, formation or stratum as may reasonably be expected to be penetrated by gas displaced or injected into such underground gas storage reservoir may be appropriated hereunder.

(d) No rights or interest in existing underground gas reservoirs, being used for the injection, storage and withdrawal of natural gas, owned or operated by others than the condemner, shall be subject to appropriation hereunder.

The right of condemnation hereby granted shall be without prejudice to the rights of the owner of said lands or of other rights or interests therein to drill or bore through the underground stratum or formation so appropriated in such manner as shall comply with orders, rules and regulations of the commission issued for the purpose of protecting underground storage strata or formations against pollution and against the escape of natural gas therefrom and shall be without prejudice to the rights of the owner of said lands or other rights or interests therein as to all other uses thereof. The additional cost of complying with such regulations or orders in order to protect the storage shall be paid by the public utility.

Laws 1951, p. 135, § 3, eff. May 26, 1951.

BLEED THROUGH

52 O.S.A., pp. 34, 35

§ 36.4 Certificate of commission

Any natural gas public utility desiring to exercise the right of eminent domain as to any property for use for underground storage of natural gas shall, as a condition precedent to the filing of its petition in the district court, obtain from the commission a certificate setting out findings of said commission (a) that the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; (b) the amount of recoverable oil and native gas, if any, remaining therein; provided, that the commission shall issue no such certificate until after public hearing is had on application, pursuant to notice served in compliance with notice in civil actions in the district court, together with notice published at least once each week for two (2) successive weeks in some newspaper of general circulation in the county or counties where the gas is proposed to be stored, the first publication to be at least ten (10) days prior to the date of the hearing.

Laws 1951, p. 135, § 4, eff. May 26, 1951.

52 O.S.A., pp. 35, 36

§ 36.5 Petition to district court—Examination and determination—Subsequent proceedings

Any natural gas public utility having first obtained a certificate from the commission as hereinbefore provided, desiring to exercise the right of eminent domain for the purpose of acquiring property for the underground storage of natural gas shall do so in the manner hereinafter provided. Such natural gas public utility shall present to the district court of the county wherein the land is situated, or to the judge thereof, a petition setting forth the purpose for which the said property is sought to be acquired, a description of the property sought to be appropriated and the

names of the owners thereof as shown by the records of such county. The petitioner shall file the certificate of the commission as a part of its petition and no order by the court granting said petition shall be entered without such certificate being filed therewith. The court or the judge thereof shall examine said petition and determine whether the petitioner has the power of eminent domain and whether said property is necessary to its lawful purposes, and if found in the affirmative, such finding shall be entered in the record and subsequent proceedings shall follow the procedure now provided by law in the exercise of the rights of eminent domain by railroads.

Laws 1951, p. 136, § 5, eff. May 26, 1951.

52 O.S.A., p. 36

§36.6 Ownership of gas

All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, shall at all times be deemed the property of the injector, his heirs, successors or assigns; and in no event shall such gas be subject to the right of the owner of the surface of said lands or of any mineral interest therein, under which said gas storage fields, sands, reservoirs, and facilities lie, or of any person other than the injector, his heirs, successors and assigns, to produce, take, reduce to possession, waste, or otherwise interfere with or exercise any control thereover, provided that the injector, his heirs, successors and assigns, shall have no right to gas in any stratum, or portion thereof, which has not been condemned under the provisions of this Act,[1] or otherwise purchased.

Laws 1951, p. 136, § 6, eff. May 26, 1951.

BLEED THROUGH

52 O.S.A., p. 37

§ 36.7 Partial invalidity

If any section, paragraph, sentence or phrase of this Act[1] shall be declared unconstitutional or void for any reason by any court of final jurisdiction, such decision shall not, in any way, invalidate or affect any other section, paragraph, sentence or phrase of this Act, but the same shall continue in full force and effect.

Laws 1951, p. 136, § 7, eff. May 26, 1951.

66 O.S. RAILROADS, 64-67 O.S.A., p. 45 pocket part

§ 53. Taking by eminent domain—Commissioners—Appointment and proceedings—Right to construct road

If the owner of any real property or interest therein over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated, shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three (3) disinterested freeholders, to be selected by said judge as commissioners, and who shall not be interested in a like question.

The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of this state or a resident of this state who has departed herefrom with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such no-

tice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish legal notices in the county where the petition is filed, the ten-day period to begin with the first publication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued.

The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvements proposed; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be transmitted to the county clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded (without further acknowledgment or proof) in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

Amended by Laws 1971, c. 33, § 1, operative Jan. 1, 1972; Laws 1973, c. 28, § 1, eff. Jan. 1 1974.

64-67 O.S.A., p. 312

§ 54. Compensation, accrual of right to

When possession is taken of property condemned, as provided herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of said compensation. R.L. 1910, § 1401.

64-67 O.S.A., pp. 47, 48, pocket part:

§ 55. Review of commissioners' report—Jury trial—Notice

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this Section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall

be distributed to all clerks of the district court by said Court Administrator. If a party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception or demand for jury trial to the last known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notices, as defined in 25 O.S. Supp. 1969, §106. After issuing the notices provided herein, the court clerk shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this Section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this Section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed twenty (20) days from the date the application is heard.

Amended by Laws 1970, c. 322, § 1, eff. Jan. 1, 1971.

12 O.S. CIVIL PROCEDURE, 12 O.S.A. § 1, p. 15

§ 3. Division of remedies

Remedies in the courts are divided into:

First, Actions.

Second, Special proceedings. R.L. 1910, § 4643.

12 O.S.A. § 1, p. 17

§ 4. Action defined

An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the

BLEED THROUGH

enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. R.L. 1910, § 4644.

12 O.S.A. § 1, p. 20

§ 5. Special proceedings

Every other remedy is a special proceeding. R.L. 1910, § 4645.

12 O.S.A. § 1, p. 37 pocket part

§ 95. Limitation of other actions

Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First. Within five (5) years: An action upon any contract, agreement or promise in writing.

* * * * * *

Third. Within two (2) years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Amended by Laws 1961, p. 60, § 1, eff. Oct. 27, 1961; Laws 1971, c. 316, § 3, emerg. eff. June 24, 1971.

12 O.S.A. § 951, p. 8 pocket part

§ 952. Jurisdiction of Supreme Court

(a) The Supreme Court may reverse, vacate or modify judgments of the District Court for errors appearing on the record, and in the reversal of such judgment may reverse,

vacate or modify any intermediate order involving the merits of the action, or any portion thereof.

(b) The Supreme Court may reverse, vacate or modify any of the following orders of the District Court, or a judge thereof:

1. A final order;

2. An order that discharges, vacates or modifies or refuses to vacate or modify a provisional remedy which affects the substantial rights of a party; or grants, refuses, vacates, modifies or refuses to vacate or modify an injunction; grants or refuses a new trial; or vacates or refuses to vacate a final judgment;

3. Any other order, which affects a substantial part of the merits of the controversy when the trial judge certifies that an immediate appeal may materially advance the ultimate termination of the litigation; provided, however, that the Supreme Court, in its discretion, may refuse to hear the appeal. If the Supreme Court assumes jurisdiction of the appeal, it shall indicate in its order whether the action in the trial court shall be stayed or shall continue.

The failure of a party to appeal from an order that is appealable under either subdivision 2 or 3 of subsection (b) of this section shall not preclude him from asserting error in the order after the judgment or final order is rendered.

Amended by Laws 1968, c. 290, § 1, eff. Jan. 13, 1969.

12 O.S.A., § 1951, p. 47, pocket part

§ 990. Appeal to Supreme Court by filing petition in error—Court rules—Record on appeal

An appeal to the Supreme Court may be commenced from an appealable disposition of a court or tribunal by filing with the Clerk of the Supreme Court a petition in error, within thirty (30) days from the date of the final order or judgment sought to be reviewed.

BLEED THROUGH

The Supreme Court shall provide by court rules, which will have the force of statute, and be in furtherance of this method of appeal:

(a) For the filing of cross-appeals;

(b) The procedure to be followed by the trial courts or tribunals in the preparation and authentication of transcripts and records in cases appealed under this act; and

(c) The procedure to be followed for the completion and submission of the appeal taken hereunder.

Provided, however, that in all cases the record on appeal shall be complete and ready for filing in the Supreme Court within the time prescribed by rules of that court but within a period of not more than six (6) months from the date of the order or judgment complained of unless the Supreme Court, for good cause shown, shall extend the time. Provided, further, that, except for the filing of a petition in error as provided herein, all steps in perfecting an appeal are not jurisdictional.

Laws 1965, c. 464, § 1. Amended by Laws 1968, c. 290, § 2, eff. Jan. 13, 1969; Laws 1970, c. 119, § 1, eff. Jan. 1, 1971.

12 O.S.A. § 951, p. 50 pocket part

§ 993. Appeal from certain interlocutory orders—Undertaking

(a) When an order

(1) Discharges or modifies an attachment or a temporary injunction,

(2) Denies a temporary injunction,

(3) Grants a temporary injunction,

(4) Refuses to appoint, or refuses to vacate the appointment of a receiver, or

(5) Directs the payment of money pendente lite,

the party aggrieved thereby may, within thirty (30) days thereafter, appeal from the order to the Supreme Court without awaiting the final determination in such cause, by filing the petition in error and the record on appeal in the Supreme Court; provided the Supreme Court may extend the time for filing the record on good cause shown.

(b) If the order discharges or modifies an attachment or temporary injunction and it becomes operative, the undertaking given upon the allowance of an attachment or temporary injunction shall stay the enforcement of such order and remain in full force until final order of discharge shall take effect.

(c) If the order grants a temporary injunction, the party seeking to appeal shall, if he desires to stay such order, give within ten (10) days after the order is rendered, an undertaking, with sufficient surety, to be approved by the clerk of the trial court, in an amount fixed by the judge, to secure the party procuring the injunction the damages he may sustain, including reasonable attorney's fees, in case it is finally decided that the temporary injunction was properly granted. The undertaking so made shall stay the effect of the temporary injunction pending appeal.

(d) Where a receiver shall be or has been appointed, upon the appellant filing an appeal bond, with sufficient sureties, in such sum as may have been required of such receiver by the court or a judge thereof, conditioned for the due prosecution of such appeal and the payment of all costs or damages that may accrue to the State or any officer or person by reason thereof, the authority of such receiver shall be suspended until the final determination of such appeal, and if such receiver shall have taken possession of any property, real or personal, the same shall be returned and surrendered over to the appellant, upon the filing and approval of said bonds.

Laws 1970, c. 289, § 1, eff. July 1, 1970.

BLEED THROUGH

12 O.S.A. § 1031, p. 125:

§ 1038. Limitation

Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivision four, five and seven, of Section 5267[1] must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or person of unsound mind and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivision three and six of the same section, shall be within three years, and in subdivision nine, within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby. R.L. 1910, § 5274.

12 O.S.A. § 1381, pp. 7, 8:

§ 1382. Cause for injunction—Temporary injunction.

When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may, also, be granted in any case where it is specially authorized by statute. R.L. 1910, § 4867.

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[1]Section 1031 of this title.

12 O.S. § 1381, p. 50 pocket part

§ 1383. When and by whom injunction granted—Affidavit showing right to

The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or, in his absence from the county or disqualification, by the county judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto. R.L. 1910, § 4868.

12 O.S.A. § 1381, p. 54

§ 1384. Notice to adverse party—Temporary restraint

If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose, at a specified time and place, and may, in the meantime, restrain such party. R.L. 1910, § 4869.

23 O.S., DAMAGES

23 O.S.A., p. 113

§ 9. Jury may give exemplary damages, when

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant. R.L. 1910, § 2851.

23 O.S.A., p. 219

§ 68. Exemplary damages for injuries to animals

For wrongful injuries to animals, being subjects of property, committed wilfully or by gross negligence, in

BLEED THROUGH

disregard of humanity, exemplary damages may be given. R.L. 1910, § 2879.

60 O.S., ESTATES IN REAL PROPERTY

60 O.S.A., p. 73

§ 64. Fee title covers what

The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

25 U.S.C., INDIANS

25 U.S.C.A., p. 426

§ 357 Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Mar. 3, 1901, c. 832, § 3, 31 Stat. 1084.

25 U.S.C.A., p. 92, pocket part

§ 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

(a) Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All

leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, and leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the Burns Paiute Reservation, the Coeur d'Alene Indian Reservation, the Kalispel Indian Reservation, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Tulalip Indian Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

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ACT OF MAY 27, 1908.

35 Stat. 312

An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

Classification of restricted allottees.

Secretary may remove restrictions.

Right of eminent domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and

nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

* * * * * *

§ 6. Representatives of the Secretary to represent restricted allottees.

And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

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ACT OF AUGUST 4, 1947

61 Stat. 732

An Act Relative to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma, and for other purposes.

Half-blood heirs and devisees restricted.

Ten days notice.

Consideration to be recited.

Grantor present unless excused by Probate Attorney.

Not removable to federal court.

Court may approve conditionally.

Probate attorney may appeal.

Sales of minors and incompetents controlled by state laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death: Provided, (a) That except as provided in subdivision (f) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated; (b) that petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereon, signed by the county judge, reciting the consideration offered and a description of the land shall be given by

publication in at least one issue of a newspaper of general circulation in the county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor, and the court must be satisfied that the consideration has been paid in full. Proceedings for approval of conveyances by restricted heirs or devisees under this section shall not be removable to the Federal court; (c) the evidence taken at the hearing shall be transcribed and filed of record in the case, the expense of which, including attorney fees and court costs, must be borne by the grantee. The court in its discretion, when deemed for the best interest of the Indian, may approve the conveyance conditionally, or may withhold approval; (d) that at said hearing competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor or when deemed necessary the court may set the petition for further hearing; (e) that the probate attorney shall have the right to appeal from any order approving conveyances to the district court of the county in which the proceedings are conducted within the time and in the manner provided by the laws of the State of Oklahoma in cases of appeal in probate matters generally, except that no appeal bond shall be required; (f) that sales of the interests of minor and incompetent persons shall be made in conformity with the laws of the State of Oklahoma. Notice of such sale shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition for sale is to be heard; (g) that nothing contained in this section shall be construed to modify or repeal the Act of February 11, 1936 (49 Stat. 1135), relating to leases for farming and grazing purposes.

BLEED THROUGH

Probate attorney to represent restricted members.

§ 4. That the attorneys provided for under the Act of May 27, 1908 (35 Stat. 312), are authorized to appear and represent any restricted member of the Five Civilized Tribes in Oklahoma before any of the courts of the State of Oklahoma in any matter in which the said restricted Indian may have an interest.

When and how state oil and gas conservation laws apply to restricted land.

§ 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: Provided, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

FEDERAL RULES

1975 Edition West Publishing Co., pp. 32 and 33;
Rule 4(d)(5)

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

p. 56; Rule 19.

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined is Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter

of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

As amended Feb. 28, 1966, eff. July 1, 1966.

BLEED THROUGH

p. 58; Rule 21.

MISJOINDER AND NON-JOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were mailed this ..... day of March, 1976, first class postage fully paid, to counsel for Respondent, Mr. Charles Crane, P. O. Box 201, Tulsa, Oklahoma 74102; the Solicitor General, Department of Justice, Washington, D.C. 20530; and to Thomas S. Kleppe, Secretary of Interior, The United States Department of Interior, 19th and C Street, N.W., Washington, D.C. 20240.

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FILED
APR 2 1976
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1256

MAXWELL DARKS,
Petitioner,

VERSUS

TRANSOK PIPE LINE COMPANY,
an Oklahoma Corporation, and
THOMAS S. KLEPPE, Secretary of Interior,
The United States Department of Interior,
Respondents.

AND

MAXWELL DARKS and LES STARKS, d/b/a
Greasy Creek Cattle Company,
Petitioners,

VERSUS

TRANSOK PIPE LINE COMPANY,
an Oklahoma Corporation,
Respondent.

TRANSOK PIPE LINE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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Attorneys for Respondent,
Transok Pipe Line Company,
an Oklahoma Corporation

April, 1976

WAYNE R. SCOTT CO., 507 S. QUAKER, TULSA, OK. 74120 – (918) 587-2052

TABLE OF CONTENTS

Table of Authorities Cited ii
Orders and Pleadings Below 1
Counter-Jurisdictional Statement 8
Constitutional Provisions and Statutes Involved in These Cases 8
Restatement of Questions 8
Counter-Statement of Case 9
Argument 12
Conclusion 29
Certificate of Service 127a

APPENDICES

Appendix A — Orders and Pleadings Below 1a
Appendix B — Constitutional Provisions and Statutes Involved 117a

TABLE OF AUTHORITIES

Cases:

Bailey v. Anderson,
326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66 (1945) 19

Cities Service Gas Co. v. Huebner,
197 P.2d 985 (Okl. 1948) 18

Delhi Gas Pipeline Corporation v. Swanson,
520 P.2d 670 (Okl. 1974) 18

Graham v. City of Duncan,
354 P.2d 458 (Okl. 1960) 18

Kaukauna Water Power Co.
v. Green Bay & Miss. Canal Co.,
142 U.S. 254, 35 L.Ed. 1004, 12 S.Ct. 173 (1891)..... 18

Lynch v. New York ex rel Pierson,
293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934) 14

North Laramie Land Co. v. Hoffman,
268 U.S. 276, 69 L.Ed. 953,
45 S.Ct. 491 (1925) 21, 22

Oklahoma City v. Wells,
91 P.2d 1077 (Okl. 1939) 18

Transok Pipe Line Co. v. Darks,
515 P.2d 218 (Okl. 1973) 10, 27

Zadig v. Baldwin,
166 U.S. 485, 41 L.Ed. 1087,
17 S.Ct. 639 (1897) 14

U.S. CONST. amend. V 13, 14, 15

U.S. CONST. amend. XIV, §1 ..... 13, 14, 15

OKLA. CONST. art. 2, §24 ..... 13, 17

BLEED THROUGH

Statutes
Federal:
28 U.S.C. §2101 8
28 U.S.C. §1257 (3) 8, 13, 27, 29
Oklahoma:
52 O.S. 1971 §36.4 10
66 O.S. 1973 §53 ..... 17, 18, 24
66 O.S. 1971 §54 ..... 17, 18
66 O.S. 1971 §55 ..... 17, 18
66 O.S. 1971 §57 24

Rules
U.S. Supreme Court Rule 19(1) (a) 26

Miscellaneous:
Annot., 1 L.Ed. 2d 1636-1637 22

In The
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MAXWELL DARKS,
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Respondent.

TRANSOK PIPE LINE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

ORDERS AND PLEADINGS BELOW

(1) Application to Assume Original Jurisdiction filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes,

State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 1a-2a).

(2) Application to Assume Original Jurisdiction filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 3a-4a).

(3) Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 5a-11a).

(4) Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 12a-18a).

(5) Brief in Support of Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 19a-30a).

BLEED THROUGH

(6) Brief in Support of Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 31a-42a).

(7) Notice filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, p. 43a-44a).

(8) Notice filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, p. 45a-46a).

(9) Affidavit of Service filed in the Supreme Court of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, p. 47a-48a).

(10) Affidavit of Service filed in the Supreme Court

of the State of Oklahoma on July 18, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, p. 49a-50a).

(11) Order of the Supreme Court of the State of Oklahoma of July 21, 1975, granting a stay against the Honorable Frank Seay, District Judge of Hughes County, Oklahoma, in the cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, p. 51a).

(12) Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 29, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 52a-54a).

(13) Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 29, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge

BLEED THROUGH

of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 55a-57a).

(14) Brief in Support of Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition filed in the Supreme Court of the State of Oklahoma on July 29, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 58a-63a).

(15) Brief in Support of Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition filed in the Supreme Court of Oklahoma on July 29, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 64a-67a).

(16) Memorandum Brief filed in the Supreme Court of the State of Oklahoma on August 8, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 68a-72a).

(17) Memorandum Brief filed in the Supreme Court

of the State of Oklahoma on August 8, 1975, in the case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 73a-77a).

(18) Reply to Memorandum Brief filed in the Supreme Court of the State of Oklahoma on August 11, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48708, (App.A, pp. 78a-80a).

(19) Reply to Memorandum Brief, filed in the Supreme Court of the State of Oklahoma on August 11, 1975, in case styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court No. 48709, (App.A, pp. 81a-83a).

(20) Order of the Supreme Court of the State of Oklahoma of September 8, 1975, granting Writs of Prohibition in cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, pp. 84a-85a).

(21) Petition for Rehearing filed in the Supreme

BLEED THROUGH

Court of the State of Oklahoma on September 16, 1975, in cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, pp. 86a-89a).

(22) Order to File Response of the Supreme Court of the State of Oklahoma of October 23, 1975, ordering Transok Pipe Line Company to file a Response to the Petition for Rehearing in cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, p. 90a).

(23) Petitioner's Response to Petition for Rehearing filed in the Supreme Court of the State of Oklahoma on November 4, 1975, in cases styled Transok Pipe Line Company v. Frank Seay, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Supreme Court Nos. 48708 and 48709, (App.A, pp. 91a-98a).

(24) Order of the Supreme Court of the State of Oklahoma of December 9, 1975, denying oral argument and rehearing in cases styled Transok Pipe Line Company v. Frank Seay, Judge, Supreme Court Nos. 48708 and 48709, (App.A, p. 116a).

COUNTER-JURISDICTIONAL STATEMENT

Respondent admits that the final order of the Supreme Court of Oklahoma was entered on September 8, 1975, that a timely motion for rehearing was denied on December 9, 1975, and that this Petition for certiorari was filed within 90 days of that date, pursuant to 28 U.S.C. § 2101. Respondent denies that this Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3) for the reasons stated in its Argument, *infra*, pages 12-31.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THESE CASES

(1) U.S. CONST. amend. V, (App.B, p. 117a).
(2) U.S. CONST. amend. XIV, (App.B, p. 117a).
(3) OKLA. CONST. art. 2 §24, (App.B, p. 117a).
(4) 28 U.S.C. §1257(3), (App.B, p. 118a).
(5) 28 U.S.C. §2101, (App.B, p. 119a).
(6) 52 O.S. 1971 §36.4, (App.B, p. 120a).
(7) 66 O.S. 1973 §53, (App.B, p. 121a).
(8) 66 O.S. 1971 §54, (App.B, p. 122a).
(9) 66 O.S. 1971 §55, (App.B, p. 123a).
(10) 66 O.S. 1971 §57, (App.B, p. 124a).
(11) U.S. Supreme Court Rule 19(1)(a), (App.B, p. 125a).

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW BY PETITIONER

(A) Whether a party with the power of eminent domain can trespass if the condemnor's entry onto the land-

BLEED THROUGH

owners's property occurred prior to the time permitted for entry onto the land in a condemnation action.

(B) Whether the landowner can halt the alleged trespass (the taking) by a temporary restraining order or injunction.

(C) Whether a party with the power of eminent domain is required to pay damages resulting from the alleged trespass (the taking).

(D) Whether the landowner has an adequate remedy for the alleged trespass (the taking).

COUNTER-STATEMENT OF THE CASE

In 1972, Respondent sought an order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use of the substantially depleted Channel Booch formation underlying Hughes County, State of Oklahoma, for the purpose of the underground storage of natural gas, as required by law. On March 5, 1973, the Corporation Commission of the State of Oklahoma granted Respondent's Application and entered Order No. 96291 holding that the Channel Booch formation was suitable for the underground storage of natural gas, and that Respondent was authorized and empowered to use said formation for the underground storage of natural gas. Said Order No. 96291 included a provision indicating that it was the certificate required by 52 O.S. 1971, §36.4, which is a condition precedent to the filing

of a petition for condemnation in the courts of the State of Oklahoma. Thereafter, the Petitioner herein sought to review Order No. 96291 in the Oklahoma Supreme Court, but the Supreme Court of Oklahoma held in *Transok Pipe Line Co. v. Darks*, 515 P.2d 218 (Okl. 1973), that it was without jurisdiction to review the Commission Order No. 96291, as the Petitioner herein had failed to timely file his appeal.

Pursuant to Commission Order No. 96291, Respondent filed a series of condemnation actions, some of which involved the Petitioner herein, including the Hughes County actions Nos. C-73-93, C-73-94, C-73-95, and an action in the United States District Court for the Eastern District of Oklahoma, No. 73-186-C. Said Hughes County actions are presently on appeal to the Oklahoma Supreme Court as Causes No. 48054, 48055, and 48056, and the Eastern District action is currently pending on that Court's jury trial docket. On November 26, 1974, Petitioners filed in the District Court of Hughes County, State of Oklahoma, two trespass actions, numbered C-74-250 and C-74-251. On January 24, 1975, Respondent filed its demurrer to the petitions sounding in trespass on the grounds that said petitions did not state a cause of action against the Respondent herein, because Petitioners' exclusive remedy lay in condemnation or inverse condemnation. On the 28th day of February,

1975, Petitioners filed their Amended Petitions; however, the defects raised by the Demurrer of Respondent herein were not cured by said Amended Petitions. On the 19th day of June, 1975, Respondent's Demurrer was argued before the Honorable Frank Seay, Judge of the District Court of Hughes County, State of Oklahoma. By order of Judge Seay, on June 19, 1975, Respondent's Demurrer was overruled.

On July 18, 1975, Respondent filed its writ of prohibition actions, Causes No. 48708 and 48709, with the Supreme Court of the State of Oklahoma. (App.A, pp. 1a-50a). On that date, Respondent filed its Brief in Support of Petition for Writ of Prohibition (App.A, pp. 19a-42a), arguing that a landowner's exclusive remedy for obtaining just compensation for all damages sustained (including damages sustained through negligence) incident to a condemnor's entry and taking in condemnation, lay in the statutory remedy of condemnation or inverse condemnation, and that the common law action of trespass would not lie against a party lawfully exercising the power of eminent domain. On the basis of this argument, Respondent maintained that the trial judge had been in error in overruling Respondent's Demurrer and prayed for a writ of prohibition. On July 29, 1975, Petitioners herein filed their Motion to Deny Application to Assume Original Jurisdiction, Motion to Dismiss

Petition for Writ of Prohibition, and Brief in Support thereof. (App.A, pp. 52a-67a).

On September 8, 1975, the Supreme Court of the State of Oklahoma entered its Order in Causes 48708 and 47809 granting the writs of prohibition prayed for by the Respondent herein. (App.A, pp. 84a-85a). On September 16, 1975, the Petitioners herein filed their Petition for Rehearing with the Oklahoma Supreme Court. (App.A, pp. 86a-89a).

On October 23, 1975, the Oklahoma Supreme Court entered its Order to File Response directed to the Respondent herein (App.A, p. 90a), and Respondent filed its Response to Petition for Rehearing on November 4, 1975. (App.A, pp. 91a-98a). On December 9, 1975, the Oklahoma Supreme Court entered its final order in Causes 48708 and 48709: "Oral Argument and Rehearing Denied." (App.A, p. 116a).

ARGUMENT

I. THIS COURT LACKS JURISDICTION AS NO FEDERAL QUESTION WAS PROPERLY PRESENTED TO THE STATE COURT OR DECIDED BY THE STATE COURT.

Petitioner seeks a review of the order entered by the Oklahoma Supreme Court in Causes 48708 and 48709. At page 6 of the Petition for Writ of Certiorari, it is stated:

> The final order of the Supreme Court of Oklahoma was entered on September 8, 1975. A timely motion for rehearing was denied on December 9, 1975, and this petition for certiorari was filed within 90 days of that date. *This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).* (Emphasis added.)

28 U.S.C. §1257(3) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: By writ of certiorari, where the validity of a treaty or statute of the United States, is drawn in question, or *where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution*, treaties, or laws *of the United States*, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (Emphasis added.)

Petitioner argues that this Court has jurisdiction to review Causes 48708 and 48709 since Petitioner drew into question the validity of an Oklahoma statute on the grounds of its being repugnant to the Fifth and Fourteenth Amendments to the United States Constitution.

Did Petitioner *draw into question* the validity of an Oklahoma statute on the grounds of its being repugnant to the Constitution? At page 18-19 of the Petition for Writ of Certiorari, it is stated:

> Petitioners *did not* specifically *raise the* issue of *violation of Amendments V and XIV* in the plead-

> ings in Cases No. 48708 (S.Ct.) and 48709 (S.Ct.). It was raised in the *oral argument, not transcribed*, on August 5, 1975 . . . .° ° ° It did not appear that violation of Amendments V and XIV was an issue in the cases. (Emphasis added.)

The validity of a state statute cannot be drawn into question in a state court by oral argument, not a part of the record. In the case of *Zadig v. Baldwin*, 166 U.S. 485, 41 L.Ed 1087, 17 S.Ct. 639 (189⁷), the Court stated at page 488:

> The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a Federal question is discussed, and it is asserted orally at bar *that in the oral argument made in the Supreme Court of California* a claim under the Federal Constitution was presented. But, manifestly, *the matters referred to form no part of the record* and are not adequate to create a Federal question when no such question was necessarily decided below, and *the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state.* (Emphasis added.)

The Court dismissed the *Zadig* appeal for want of jurisdiction. Similarly, in the case of *Lynch v. New York ex rel Pierson*, 293 U.S. 52, 79 L.Ed 191, 55 S.Ct. 16 (1934), Petitioner sought a writ of certiorari to the Supreme Court of the State of New York. Chief Justice

Hughes in delivering the opinion of the Court stated at page 54:

> [J]urisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and *statements which are not a part of the record*. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Emphasis added.)

The record (as admitted at page 18-19 of the Petition) does not disclose that a federal question was necessary to the determination of Causes 48708 or 48709, nor does it show that a federal question was actually decided or that the judgment rendered by the Oklahoma Supreme Court could not have been given without deciding a federal question. Petitioners' oral argument of the Fifth and Fourteenth Amendments, not of record, did not properly draw into question the validity of an Oklahoma statute.

Petitioners' final jurisdictional argument is that the federal questions purportedly involved in Causes 48708 and 48709 arose *after* the Oklahoma Supreme Court's decision of Causes 48708 and 48709. At page 19 of the Petition, it is stated:

> It did not appear that violation of Amendments V and XIV was in issue in the cases. The Supreme Court of Oklahoma entered its order of December 9, 1975, merely stating, "Oral Argument and Rehearing Denied." It became an obvious issue in these cases from which writs are sought when the federal district court refused to allow elements of trespass damages included as an element of damages when it granted Respondent a new trial on (visible) surface damages only, even though Petitioner Darks requested a new trial on trespass damages and other elements of damages.

Petitioner is arguing in the above-quoted language that the Federal District Court's decision retroactively injected a federal question into Causes 48708 and 48709. Petitioners' failure to properly raise and preserve a federal question in the Oklahoma Supreme Court in Causes 48708 and 48709 cannot be rectified by an order of the United States District Court for the Eastern District of Oklahoma.

Petitioner has wholly failed to show this Court in its Petition for Writ of Certiorari that any federal question was properly presented to the state court for decision or decided by the state court. Having failed to establish jurisdiction in this Court, Petitioners' application for a writ of certiorari to the Supreme Court of Oklahoma should be denied.

II. THE FEDERAL QUESTIONS PURPORTEDLY RAISED BY PETITIONER HAVE BEEN HERETOFORE DETERMINED BY THIS COURT.

The questions presented for review by Petitioner are:

(A) Whether a party with the power of eminent domain can trespass if the condemnor's entry onto the landowner's property occurred prior to the time permitted for entry onto the land in a condemnation action.

(B) Whether the landowner can halt the alleged trespass (the taking) by a temporary restraining order or injunction.

(C) Whether a party with the power of eminent domain is required to pay damages resulting from the alleged trespass (the taking).

(D) Whether the landowner has an adequate remedy for the alleged trespass (the taking).

Assuming arguendo that Petitioner had properly raised the above questions in the Supreme Court of Oklahoma, this Court's prior decisions would be determinative of those questions.

(A) A party lawfully exercising the power of eminent domain cannot be guilty of trespass. Pursuant to the statutes of the State of Oklahoma, 66 O.S. §§53-55, and the Oklahoma Constitution, OKLA. CONST. art.2, §24, a party with the power of eminent domain can condemn property by filing a condemnation action, having commissioners appointed, paying the commissioners' award into court, and entering into possession of the land. Thereafter, either the condemnor or condemnee may timely file exceptions to the commissioners' report, timely file a demand for a jury trial to judicially

determine the just compensation to which the landowner is entitled, or both. If a party with the power of eminent domain does not follow the condemnation procedure prescribed by 66 O.S. §§53-55 and OKLA CONST. art.2, §24, but simply enters into possession of the land, is this entry and taking a trespass?

The Oklahoma Supreme Court has repeatedly held that a landowner's *exclusive* remedy for an entry and taking is inverse condemnation, and that a landowner does *not* have a cause of action in trespass. *Delhi Gas Pipeline Corporation v. Swanson*, 520 P.2d 670 (Okl. 1974), *Graham v. City of Duncan*, 354 P.2d 458 (Okl. 1960), *Cities Service Gas Co. v. Huebner*, 197 P.2d 985 (Okl. 1948), and *Oklahoma City v. Wells*, 91 P.2d 1077 (Okl. 1939). The Oklahoma decisions are in line with the case of *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 35 L.Ed. 1004, 12 S.Ct. 173 (1891), in which the Supreme Court of the United States stated at page 280:

> Where a statute for the condemnation of lands provides a definite and complete remedy for obtaining compensation, *this remedy is exclusive; the common law remedy* or proceeding *is superseded* by the statute, and the owner must pursue the course pointed out by it. (Emphasis added.)

An entry and taking, which occurs prior to the time

permitted in a condemnation action, is not a trespass, neither is it unconstitutional. In the case of *Bailey v. Anderson*, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66 (1945), the United States Supreme Court denied a petition for a writ of certiorari and dismissed the cause for want of a properly presented substantial federal question, stating at pages 204-205:

> Appellant contends here, as he did in the state courts, that [the state statute] infringes the asserted constitutional immunity by sanctioning appellee's entry upon the land and the alteration of its physical condition, in advance of the appointment of the commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation. But it has long been settled that *due process does not require the condemnation of land to be in advance of its occupation by the condemning authority*, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. [Numerous citations omitted.] (Emphasis added.)

The Oklahoma Supreme Court in granting the writs of prohibition in Causes 48708 and 48709 followed an unbroken line of authority holding that a landowner's exclusive remedy for an entry and taking lies in inverse condemnation. The Oklahoma Supreme Court in granting the writs of prohibition against Judge Seay merely reversed the trial court's erronerous decision to allow the

Petitioners[1] a remedy other than the *exclusive* remedy of inverse condemnation. By prior decision, this Court has already determined that due process is not offended by a condemnor's entry onto the land of the property owner prior to the time permitted in a condemnation

---

[1]Petitioner Darks argues on behalf of Petitioner Greasy Creek Cattle Company, that the alleged partnership was not made a party defendant in the pending condemnation actions; consequently, it does not have a remedy to recover its damages. In Oklahoma Supreme Court Causes 48708 and 48709, Respondent questioned the very existence of the Greasy Creek Cattle Company. In oral argument before the Oklahoma Supreme Court and at page 3 of Transok's Response to Petition for Rehearing (App.A, p. 94a), the Respondent challenged the existence of the alleged partnership by reference to the pleadings of the Petitioner, Maxwell Darks. In said documents, Maxwell Darks was shown to be the owner of the real property and the owner of the cattle, and Mr. Starks was shown to be merely the caretaker of the cattle on the Darks' property. Respondent herein noted that the Greasy Creek Cattle Company was never mentioned in said pleadings of Maxwell Darks; furthermore, the Oklahoma Supreme Court in its order of September 8, 1975, stated:

> It further appearing to this Court that such last-mentioned causes of action were filed by the owner of lands sought to be condemned and his *alleged* partner against the petitioner herein and that they sound in tort (trespass) and seek damages against the real premises and personalty located thereon. (Emphasis added.)

Petitioner desires to embroil this Court in the factual quagmire of the existence of the alleged partnership; but, assuming arguendo that Petitioner Greasy Creek Cattle Company does exist, the alleged partner Darks (Petitioner herein) is already a party to said pending Hughes County condemnation actions and has entered an appearance therein; consequently, the alleged partnership is already a party in said actions and may raise and recover its alleged damages in those actions.

action, and the prior decisions of this Court and the Oklahoma Supreme Court have held that a condemning authority's entry and taking, which occurs prior to the time permitted for entry in a condemnation action, is not a trespass.

(B) Petitioner argues that the statutes of the State of Oklahoma do not provide adequate procedural safeguards against an entry and taking by a condemning authority, in violation of due process of law, complaining that the landowner is without a remedy to halt the taking by resort to a temporary restraining order or injunction. It is argued, at pages 23-24 of the Petition, that the landowner is entitled to a hearing to challenge the entry and taking by the condeming authority before the condemnor has entered into possession of the property. Once again, the purported federal question has been determined by the prior decisions of this Court. In the case of *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 69 L.Ed. 953, 45 S.Ct. 491 (1925), the Court stated at page 284:

> There remains for consideration the plaintiff's objection that the statutory method of giving notice of the proposed location of the road under §2525 of the statute was insufficient, and *that plaintiff was afforded no opportunity for a hearing before* either the appraisers or the board of county commissioners with respect either to the location of the road, or the damage suffered by plaintiff by the opening of the road. The taking of property provided for by the

> statute is a taking of land under the direction of public officers for a public use. *As was held in Bragg v. Weaver, supra,* [251 U.S. 57, 64 L.Ed. 135, 40 S.Ct. 62 (1919)], *the necessity and expediency of the taking of property for public use "are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process under the section of the 14th Amendment."* (Emphasis added.)

The rule of law stated in *North Laramie Land Co.* has been cited by this Court with such regularity, that an annotation concerning said rule appears at 1 L.Ed. 2d 1636-1637:

> Notice in Condemnation Proceedings, Necessity of Notice; Time When Notice Must Be Given; §3[a] Notice to Owner; Distinction Between Taking and Compensation, Notice of Taking Property:
>
> Where the taking of property is for a public use, the due process clause of the Fourteenth Amendment does not require that the necessity and expediency of the taking be determined upon notice and hearing.[12] [n.12: Sears v Akron (1918) 246 US 242, 62 L ed 688, 38 S Ct 245, infra; Bragg v Weaver (1919) 251 US 57, 64 L ed 135, 40 S Ct 62, infra, §5; Joslin Mfg. Co. v Providence (1923) 262 US 668, 67 L ed 1167, 43 S Ct 684, infra; Rindge Co. v Los Angeles County (1923) 262 US 700, 67 L ed 1186, 43 S Ct 689, infra; Georgia v Chattanooga (1924) 264 US 472, 68 L ed 796, 44 S Ct 369 (holding that the lack of opportunity to be heard before the passage of an ordinance opening a street is no ground for complaint); North Laramie Land Co. v Hoffman

(1925) 268 US 276, 69 L ed 953, 45 S Ct 491, infra, §6. Dicta to the contrary can no longer be regarded as authority. See, for instance, Carson v Brockton Sewer Comrs. (1901) 182 US 398, 45 L ed 1151, 21 S Ct 860, where the court said: "There is no doubt that, when land is proposed to be taken and devoted to the public service, or any serious burden is laid upon it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking. . . . " See also North Laramie Land Co. v Hoffman (1925) 268 US 276, 69 L ed 953, 45 S Ct 491, infra, §6 (last sentence in quotation from court's opinion).] The rule has been rested on the ground that these questions are legislative rather than judicial in nature, *no matter who may be charged with their determination.* Due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, so long as the owner has opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken. (Emphasis added.)

Petitioner argues that a landowner must be provided the procedural safeguard of a hearing to question the taking and halt the taking by a restraining order or injunction, but the numerous decisions of this Court, above cited, have rejected that argument.

(C) Is a party with the power of eminent domain required to pay damages resulting from its entry and taking ("trespass")? A condemnor must, of course, pay just compensation for the damages resulting from its

taking. The order of the Oklahoma Supreme Court in Causes 48708 and 48709 did not challenge the due process requirement that just compensation be paid by a condemning authority for its taking.

(D) Does a landowner have an adequate remedy under the statutes of the State of Oklahoma for a condemnor's taking ("trespass") which occurs prior to the time permitted in a condemnation action? The remedy of a landowner for an entry and taking, where no condemnation action has been filed, is to file an *inverse* condemnation action pursuant to the provisions of 66 O.S. 1971 §57 and the provisions of 66 O.S. 1973 §53, which state, respectively, in pertinent part:

> Provided, that in case any *corporation* or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it *might have resorted to condemnation proceedings*, as provided in this article, any land without having purchased or condemned the same, *the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings.* (Emphasis added.)

> [T]he district judge of the county in which said real property may be situated, shall, upon the application or petition of *either party*, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three (3) disinterested free-holders, to be selected by said judge as commissioners, and who shall not be interested in a like question. (Emphasis added.)

The statutory procedure of inverse condemnation affords the land-owner an opportunity to be heard, offer evidence as to the value of the land taken, and obtain the just compensation to which the landowner is entitled for any entry and taking by a condemning authority, which occurs prior to the time permitted for entry onto the land in a condemnation action.

Nevertheless, Petitioner argues that the United States District Court for the Eastern District of Oklahoma has indicated that it will not allow testimony of *trespass* damages at the forthcoming jury trial of Case No. 73-186-C. The Eastern District order merely reflects the rule of law, discussed *supra*, that a condemnor's taking is not a trespass. This not to say that Petitioner will not be allowed to introduce evidence of condemnation damages; the Eastern District indicated it would allow testimony as to surface damage and when the Hughes County condemnation actions C-73-93 (48054), C-73-94 (48055), and C-73-95 (48056) have been decided by the Oklahoma Supreme Court and remanded to the trial court, Petitioner will be free to present testimony as to Petitioner's damages sustained incident to Respondent's taking.

The order of the Oklahoma Supreme Court in Causes 48708 and 48709 did not deny Petitioners their remedy of inverse condemnation (or condemnation).

Assuming arguendo that Petitioner had properly

raised the above questions in the state court, should this Court grant the Petition for Writ of Certiorari? Supreme Court Rule 19(1) (a) states:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> > Where a state court has decided a federal question of substance *not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.* (Emphasis added.)

In the case at bar, each and every one of the federal questions allegedly raised by Petitioner in the state court have been heretofore determined by this Court. The Petition for Writ of Certiorari to the Supreme Court of Oklahoma should be denied.

III. THIS COURT LACKS JURISDICTION OF THE COLLATERAL CASES DISCUSSED BY PETITIONER.

A substantial portion of the Petition for Writ of Certiorari to the Supreme Court of Oklahoma is concerned with three collateral cases: (A) Corporation Commission Cause No. 35868, in which Order No. 96291 was issued; (B) the three consolidated Hughes County

condemnation actions, No. C-73-93, C-73-94, and C-73-95, which are presently on appeal to the Oklahoma Supreme Court as Causes No. 48054, 48055, and 48056, respectively; and (C) the condemnation action now pending in the United States District Court for the Eastern District of Oklahoma, No. 73-186-C. Ostensibly, Petitioner is seeking a writ of certiorari only on the writ of prohibition actions, Causes 48708 and 48709; however, Petitioner insists on raising questions incident to the three aforementioned collateral causes, despite the fact that this Court does not have jurisdiction of those issues.

(A) Corporation Commission Order No. 96291 was entered on March 5, 1973. Petitioner herein sought to have that order reviewed by the Oklahoma Supreme Court, but failed to timely file an appeal from that order as indicated by the Oklahoma Supreme Court's decision in the case of *Transok Pipe Line Co. v. Darks*, 515 P.2d 218 (Okl. 1973). Having failed to timely raise his objections to Order No. 96291 in the Oklahoma Supreme Court, Petitioner attempts to raise those objections with this Court, three years out of time in a cause purportedly seeking a review only of the writ of prohibition cases. This Court should not assume jurisdiction under 28 U.S.C. §1257(3) to review an order which has been final for three years and which the highest court of a state has refused to review. Petitioners' attack on Corporation Commission Order No. 96291 is an extra-

legal argument, and this Honorable Court should not assume jurisdiction of that cause.

(B) The Hughes County condemnation actions, No. C-73-93, C-73-94, and C-73-95, are presently on appeal to the Oklahoma Supreme Court as Causes No. 48054, 48055, and 48056, respectively, and are consolidated under No. 48054. The Hughes County condemnation appeals are awaiting decision by the Oklahoma Supreme Court; in fact, Petitioner has not filed, to date, his reply brief in those actions. At page 32-33 of the Petition for Writ of Certiorari, it is stated:

> By granting the Writs of Prohibition in the two cases herein, the Supreme Court of Oklahoma has made an unwritten predetermination (outside the scope of due process of law), that when all briefs are finally submitted in the three related condemnation cases appealed from the Hughes County District Court, and now pending before the Supreme Court of Oklahoma, the Court *will write a decision in those cases showing that these condemnation cases have proceeded according to due process of law with no remedy for trespass to be adjudicated therein . . . Petitioners would have included those three companion cases in this writ of certiorari had the unwritten decision been reduced to a written decision at the time this petition seeking writ of certiorari was prepared.* (Emphasis added.)

Petitioners' prediction of the Oklahoma Supreme Court's decision in Causes 48054, 48055, and 48056 is not tantamount to a final order by the Oklahoma Supreme

Court in those causes. Absent a final order, this Court should not assume jurisdiction under 28 U.S.C. §1257(3) to review Petitioners' attack on the three Hughes County condemnation appeals, even if a federal question had been raised therein.

(C) The condemnation action now *pending* on the jury trial docket of the United States District Court for the Eastern District of Oklahoma, Case No. 73-186-C, is not yet ripe for review by this Court as no final order has been entered in that case. Furthermore, a final decision in said Eastern District action would be reviewable by the Tenth Circuit Court of Appeals, not this Court. Absent a final order in the trial court, an appeal to the Tenth Circuit, and a final order in the Tenth Circuit, this Court should not accept jurisdiction to consider Petitioners' attack on the Eastern District condemnation action, 73-186-C, and cannot accept jurisdiction under 28 U.S.C. §1257(3).

This Court should not accept jurisdiction to consider the extralegal arguments advanced by Petitioners concerning the aforementioned collateral cases.

CONCLUSION

Petitioner prays that this Court grant a Writ of Certiorari to the Supreme Court of Oklahoma to review that court's decision in Causes 48708 and 48709. The Petition for Writ of Certiorari to the Supreme Court of

Oklahoma should be denied because this Court does not have jurisdiction of this cause for the following reasons:

(1) No state statute was properly drawn into question in the state court as being repugnant to the United States Constitution; consequently, there is no federal question before this Court.

(2) Even if the purported federal questions had been properly presented and preserved in the state court, this Court's prior decisions are determinative of all questions raised by Petitioners.

(3) Of the three collateral cases discussed by Petitioner, two are not ripe for decision by this Court, and one is beyond the time for appeal to this Court and could not have been appealed to this Court in any event, since the decision therein was not by the highest court of Oklahoma.

Apart from the jurisdictional reasons for denying the Petition for Writ of Certiorari to the Supreme Court of Oklahoma, this Court should deny the petition, because the decision of the Oklahoma Supreme Court in Causes 48708 and 48709 was correct, accurate, and fair. The decision of the Oklahoma Supreme Court in holding that a landowner does not have a cause of action in trespass against a party lawfully exercising the power of eminent domain was correct; in that, it was in accord with long-standing federal and state decisions holding that condemnation or inverse condemnation is a landowner's *exclusive* remedy for a *taking* of his property. Petitioner

has shown this Court nothing to warrant a re-examination of a settled point in the law of eminent domain which has stood the test of time — a rule of law which includes a remedy for the landowner and yet allows an orderly taking by a condemnor without undue delay. The decision of the Oklahoma Supreme Court was fair; in that, it does not foreclose Petitioners' recovery of their damages occasioned by Respondent's taking Petitioner Darks is already a party in the Hughes County and federal condemnation actions, and Petitioner Greasy Creek Cattle Company is already a party in said Hughes County actions by virtue of the alleged partner Darks' appearance in those actions, who may claim the damages of the alleged partnership in those actions.

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Oklahoma.

Respectfully submitted,

Robert L. Lawrence
Kenneth W. East
Kevin M. Abel

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Tulsa, Oklahoma 74103
Telephone: (918) 583-3611

April, 1976

APPENDIX A
(Orders and Pleadings Below)

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma,
Respondent.

Supreme Ct. No. 48708
District Ct. No. C-74-250

APPLICATION TO ASSUME ORIGINAL JURISDICTION

Comes now the Petitioner, Transok Pipe Line Company, a corporation, and respectfully prays this Court to assume jurisdiction in an original proceeding under Petitioner's Writ of Prohibition and Brief in Support of Petition for Writ of Prohibition, copies of which are attached hereto, for the following reasons, to-wit:

I.

That on the 26th day of November, 1974, Maxwell Darks filed a trespass action against the Petitioner in the District Court of Hughes County, State of Oklahoma, District Court No. C-74-250, praying for damages in the amount of $130,000, allegedly resulting from the supposed trespass. Proper notice was given the Defendant, Transok Pipe Line Company, and the Petitioner, herein, entered its appearance in said trespass action on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that, " . . . the Petition does not state a cause of action against the Defendant

in that the allegations made in such Petition are properly adjudicable in an action in eminent domain rather than tort and that actions in eminent domain are presently pending before this Court." On or about the 28th day of February, 1975, Maxwell Darks filed his Amended Petition; however, the defect raised by the Demurrer of Transok Pipe Line Company was not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, on June 19, 1975, entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously and improperly overruled.

II.

That the relief sought in this original proceeding, a Writ of Prohibition, is against the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, for the reason that Respondent's overruling of said Demurrer was contrary to law and will result in irreparable damage and harm to Petitioner, if said District Court is allowed to proceed.

III.

That the relief sought in this original proceeding is within the superintending control of this court.

TRANSOK PIPE LINE COMPANY
Petitioner

By: /s/ Robert L. Lawrence
Robert L. Lawrence

By: /s/ Charles B. Crane
Charles B. Crane

By: /s/ Kevin M. Abel
Kevin M. Abel

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Tulsa, OK 74102
Telephone: (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma,
Respondent.

Supreme Ct. No. 48709
District Ct. No. C-74-251

APPLICATION TO ASSUME ORIGINAL JURISDICTION

Comes now the Petitioner, Transok Pipe Line Company, a corporation, and respectfully prays this Court to assume jurisdiction on an original proceeding under Petitioner's Writ of Prohibition and Brief in Support of Petition for Writ of Prohibition, copies of which are attached hereto, for the following reasons, to-wit:

I.

That on the 26th day of November, 1974, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed a trespass action against the Petitioner in the District Court of Hughes County, State of Oklahoma, District Court No. C-74-251, praying for damages in the amount of $124,800, allegedly resulting from the supposed trespass. Proper notice was given the Defendant, Transok Pipe Line Company, and the Petitioner herein, entered its appearance in said trespass action on December 26, 1974. Thereafter on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that, " . . . the Petition does not state a cause of action against the Defendant in that the allegations made in such Petition are properly

adjudicable in an action in eminent domain rather than tort and that actions in eminent domain are presently pending before this Court." On or about the 28th day of February, 1975, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed their Amended Petition; however, the defect raised by the Demurrer of Transok Pipe Line Company was not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, on June 19, 1975, entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously and improperly overruled.

II.

That the relief sought in this original proceeding, a Writ of Prohibition, is against the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, for the reason that the Respondent's overruling of said Demurrer was contrary to law and will result in irreparable damage and harm to Petitioner if said District Court is allowed to proceed.

III.

That the relief sought in this original proceeding is within the superintending control of this Court.

TRANSOK PIPE LINE COMPANY,
Petitioner

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel

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IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Ct. No. 48708 District Ct. No. C-74-250

PETITION FOR WRIT OF PROHIBITION

Comes now the Petitioner, Transok Pipe Line Company, a corporation, and shows this Honorable Court:

I.

That Transok Pipe Line Company, a corporation, is a corporation duly organized under the laws of the State of Oklahoma, with its principal office and place of business located in Tulsa, Oklahoma. Transok Pipe Line Company, a corporation, is authorized and is qualified to engage in the business of transporting natural gas by pipeline and is authorized and qualified to distribute and sell the same to industrial consumers throughout the State of Oklahoma. By virtue of the public nature of its business, and specifically the provisions of 52 O.S. 1913, §§ 22 and 27; 52 O.S. 1951, §§ 36.1-36.7; 66 O.S. 1910, §§ 51, 52, 54, 56, 58, 59, and 60; 66 O.S. 1973 §53; 66 O.S. 1970, § 55, and the provisions of 66 O.S. 1929, § 57, it is endowed with the right of eminent domain in the appropriation and use of lands necessary to its authorized, lawful, and proper business endeavors described above.

II.

That pursuant to Petitioner's right of eminent domain, Transok Pipe Line Company, a corporation, sought an Order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use, for the purpose of the underground storage of natural gas, of the Channel Booch Formation more particularly described as follows, to-wit:

> The Channel Booch Formation is identified by the log on the Adelman No. 1-B Well, located in the center of the Northwest Quarter Northwest Quarter (NW 1/4 NW 1/4) of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2,496 feet and a base of approximately 2,556 feet; said Channel Booch Formation underlying the Northeast Quarter Northeast Quarter (NE 1/4 NE 1/4) of Section 2; North Half North Half (N 1/2 N 1/2) Section 1, Township 7 North, Range 10 East; East Half Southeast Quarter (E 1/2 SE 1/4) and Southeast Quarter Northeast Quarter (SE 1/4 NE 1/4) Section 35; South Half (S 1/2) and Northeast Quarter (NE 1/4) and South Half South Half Northwest Quarter (S 1/2 S 1/2 NW 1/4) of Section 36, Township 8 North, Range 10 East; Southwest Quarter (SW 1/4) and North Half North Half Southeast Quarter (N 1/2 N 1/2 SE 1/4) and North Half (N 1/2) of Section 31; South Half Southwest Quarter (S 1/2 SW 1/4) and Southeast Quarter (SE 1/4) Section 30; North Half Northwest Quarter (N 1/2 NW 1/4) and North Half South Half Northwest Quarter (N 1/2 S 1/2 NW 1/4) and North Half North Half Northeast Quarter (N 1/2 N 1/2 NE 1/4) Section 32; South Half (S 1/2) and Northeast Quarter (NE 1/4) and South Half Northwest Quarter (S 1/2 NW 1/4) and Northeast Quarter Northwest Quarter (NE 1/4 NW 1/4) Section 29; North Half Northwest Quarter Southeast Quarter

(N 1/2 NW 1/4 SE 1/4) and North Half Southwest Quarter (N 1/2 SW 1/4) and North Half South Half Southwest Quarter (N 1/2 S 1/2 SW 1/4) Section 28; South Half Southwest Quarter Southeast Quarter (S 1/2 SW 1/4 SE 1/4) and Southeast Quarter Southeast Quarter (SE 1/4 SE 1/4) Section 20; South Half (S 1/2) and Northeast Quarter (NE 1/4) and Southeast Quarter Northwest Quarter (SE 1/4 NW 1/4) Section 21; West Half West Half (W 1/2 W 1/2) Section 22; West Half Northwest Quarter (W 1/2 NW 1/4) Section 27, Township 8 North, Range 11 East, Hughes County, Oklahoma.

The Corporation Commission of the State of Oklahoma, by Order No. 96291, granted the Application of the Petitioner, thereby holding that the Channel Booch Formation was suitable for the underground storage of natural gas and that Petitioner was authorized and empowered to use said Channel Booch Formation for the underground storage of natural gas. Said Order No. 96291 included a provision that it was the certificate required by 52 O.S. 1961, Section 36.4, which is a condition precedent to the filing of a petition for condemnation in the courts of the State of Oklahoma. Maxwell Darks appealed the Corporation Commission's decision in Case No. 35868 to the Oklahoma Supreme Court, Number 46762, but this Honorable Court dismissed said appeal. Thereafter, in the District Court of Hughes County, State of Oklahoma, the Petitioner filed the following cases: Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, No. C-73-93; Transok Pipe Line Company, a corporation, v. Maxwell Darks, C-73-94; Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, C-73-95; and Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, C-73-100. Maxwell Darks petitioned this court for a Writ of Prohibition,

Supreme Court No. 46719, seeking a determination that the Corporation Commission of the State of Oklahoma, in case No. 35868, and the District Court of Hughes County, in the District Court cases C-73-93 through C-73-102, of which Maxwell Darks was a party only in C-73-93, C-73-94, C-73-95, and C-73-100, were, in these actions, asserting an unauthorized and unlawful exercise of judicial power. This Honorable Court denied Maxwell Darks' prayer for a Writ of Prohibition, and said District Court cases proceeded according to the provisions of 66 O.S. §§ 53-63. In each of the aforementioned Hughes County District Court Cases, C-73-93, C-73-94, C-73-95, and C-73-100, Transok Pipe Line Company and Maxwell Darks filed their respective Demands for a Jury Trial, and in each of the Hughes County cases, the District Court approved the Commissioners Report and confirmed the taking by condemnation. Maxwell Darks appealed the Hughes County District Court cases of C-73-93, C-73-94, and C-73-95 to the Oklahoma Supreme Court, numbered by the Court, respectively, 48054, 48055, and 48056; said cases on appeal from the District Court of Hughes County are still pending before this Honorable Court. Maxwell Darks did not appeal the Hughes County District Court case of C-73-100. The jury trials in the Hughes County condemnation cases are pending subject to a decision by this Honorable Court in the aforementioned appeals; said pending jury trials, when held, will fully determine the rights of the condemnee and all damages to which he is entitled, incident to Petitioners taking in condemnation and its actions taken in furtherance of its underground gas storage project.

III.

On the 26th day of November, 1974, Maxwell Darks filed a trespass action in the District Court of Hughes

County, State of Oklahoma, No. C-74-250, praying for damages in the amount of $130,000, allegedly resulting from the supposed trespass of the Petitioner herein, Transok Pipe Line Company, a corporation. Proper notice was given the Defendant, Transok Pipe Line Company, and Petitioner entered its appearance on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that, " . . . the Petition does not state a cause of action against the Defendant in that the allegations made in such Petition are properly adjudicable in an action in eminent domain rather than tort, and that actions in eminent domain are presently pending before this Court." Petitioner cited as its authority in support of said Demurrer the provisions of 66 O.S. 1910, §§ 51, 52, 54, 56, and 58; 66 O.S. 1973, § 53; 66 O.S. 1970, § 55; 66 O.S. 1929, § 57; 52 O.S. 1913, § 27; and the provisions of 52 O.S. 1959, §§ 36.1 through 36.7; and the case law authority of *Oklahoma City v. Wells*, 91 P2d 1077 (1939), and *Graham v. City of Duncan*, 354 P2d 458 (1960). On or about the 28th day of February, 1975, Maxwell Darks filed in the District Court Case C-74-250 his Amended Petition; however, the defect raised by the Demurrer of Transok Pipe Line Company was not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, on June 19, 1975, entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously overruled, to which ruling the Petitioner, herein, excepted and its exception was allowed.

IV.

That as a result of the Respondent's erroneous ruling in said trespass action, C-74-250, said cause will continue in the District Court of Hughes County, unless prohibited by this Honorable Court, and said Respondent will proceed to have said cause tried in the District Court of Hughes County, and will render a decision therein, despite the fact, that the District Court of Hughes County has pending before it the condemnation jury trials that will fully determine the damages prayed for in the trespass action; thereby, making it possible for the condemnee to obtain a *double recovery* for Petitioner's entry onto and taking of the property, in question, and Petitioner's actions taken thereon in furtherance of its underground gas storage project.

V.

That Petitioner is without an adequate remedy at law; that a remedy by appeal or by any other method except by prohibition is inadequate and insufficient; in that, said cause will improperly proceed in the District Court of Hughes County; that said Respondent assumes to exercise judicial power not granted by law, and is attempting to make unauthorized application of judicial force and power; that Respondent is attempting to proceed with this cause, when as a matter of law, said cause should have been dismissed pursuant to Petitioner's Demurrer, and that the Petitioner is without any ordinary and usual remedy, or equal remedy save that this Court issue its Writ of Prohibition.

WHEREFORE, your Petitioner prays this Honorable Court issue its Writ of Prohibition directed to the Honorable Frank Seay, Respondent, herein, commanding him to cease, desist, and refrain from proceeding further in his capacity as Judge of the District Court of Hughes

County in the case of Maxwell Darks v. Transok Pipe Line Company, No. C-74-250.

TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

P. O. Box 201
Tulsa, OK 74102
Telephone (918) 583-3611

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

VERIFICATION BY ATTORNEY

STATE OF OKLAHOMA }
COUNTY OF TULSA } SS.

Charles B. Crane, being first duly sworn, deposes and says:

That he is one of the attorneys of record in the above entitled action; that he has personal knowledge of the facts of this cause, and that he has read the foregoing Petition for Writ of Prohibition, is familiar with the contents thereof, and believes that the facts therein set forth are true and correct.

/s/ Charles B. Crane
Charles B. Crane

Subscribed and sworn to before me this 17th day of July, 1975.

(SEAL)
My Commission expires:
2-5-78

/s/ Sharyn Manning
Notary Public

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma,
Respondent.

Supreme Ct. No. 48709
District Ct. No. C-74-251

PETITION FOR WRIT OF PROHIBITION

Comes now the Petitioner, Transok Pipe Line Company, a corporation, and shows this Honorable Court:

I.

That Transok Pipe Line Company, a corporation, is a corporation duly organized under the laws of the State of Oklahoma, with its principal office and place of business located in Tulsa, Oklahoma. Transok Pipe Line Company, a corporation, is authorized and is qualified to engage in the business of transporting natural gas by pipeline and is authorized and qualified to distribute and sell the same to industrial consumers throughout the State of Oklahoma. By virtue of the public nature of its business, and specifically the provisions of 52 O.S. 1913, §§ 22 and 27; 52 O.S. 1951, §§ 36.1-36.7; 66 O.S. 1910, §§ 51, 52, 54, 56, 58, 59, and 60; 66 O.S. 1973, Section 53; 66 O.S. 1970, Section 55, and the provisions of 66 O.S. 1929, Section 57, it is endowed with the right of eminent domain in the appropriation and use of lands necessary to its authorized, lawful, and proper business endeavors described above.

II.

That pursuant to Petitioner's right of eminent domain, Transok Pipe Line Company, a corporation, sought an Order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use, for the purpose of the underground storage of natural gas, of the Channel Booch Formation more particularly described as follows, to-wit:

> The Channel Booch Formation is identified by the log on the Adelman No. 1-B Well, located in the center of the Northwest Quarter Northwest Quarter (NW 1/4 NW 1/4) of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2,496 feet and a base of approximately 2,556 feet; said Channel Booch Formation underlying the Northeast Quarter Northeast Quarter (NE 1/4 NE 1/4) of Section 2, North Half North Half (N 1/2 N 1/2) Section 1, Township 7 North, Range 10 East; East Half Southeast Quarter (E 1/2 SE 1/4) and Southeast Quarter Northeast Quarter (SE 1/4 NE 1/4) Section 35; South Half (S 1/2) and Northeast Quarter (NE 1/4) and South Half South Half Northwest Quarter (S 1/2 S 1/2 NW 1/4) of Section 36, Township 8 North, Range 10 East; Southwest Quarter (SW 1/4) and North Half North Half Southeast Quarter (N 1/2 N 1/2 SE 1/4) and North Half (N 1/2) of Section 31; South Half Southwest Quarter (S 1/2 SW 1/4) and Southeast Quarter (SE 1/4) Section 30; North Half Northwest Quarter (N 1/2 NW 1/4) and North Half South Half Northwest Quarter (N 1/2 S 1/2 NW 1/4) and North Half North Half Northeast Quarter (N 1/2 N 1/2 NE 1/4) Section 32; South Half (S 1/2) and Northeast Quarter (NE 1/4) and South Half Northwest Quarter (S 1/2 NW 1/4) and Northeast Quarter Northwest Quarter (NE 1/4 NW 1/4) Section 29; North Half Northwest Quarter Southeast Quarter

(N 1/2 NW 1/4 SE 1/4) and North Half Southwest Quarter (N 1/2 SW 1/4) and North Half South Half Southwest Quarter (N 1/2 S 1/2 SW 1/4) Section 28; South Half Southwest Quarter Southeast Quarter (S 1/2 SW 1/4 SE 1/4) and Southeast Quarter Southeast Quarter (SE 1/4 SE 1/4) Section 20; South Half (S 1/2) and Northeast Quarter (NE 1/4) and Southeast Quarter Northwest Quarter (SE 1/4 NW 1/4) Section 21; West Half West Half (W 1/2 W 1/2) Section 22; West Half Northwest Quarter (W 1/2 NW 1/4) Section 27, Township 8 North, Range 11 East, Hughes County, Oklahoma.

The Corporation Commission of the State of Oklahoma, by Order No. 96291, granted the Application of the Petitioner, thereby holding that the Channel Booch Formation was suitable for the underground storage of natural gas and that Petitioner was authorized and empowered to use said Channel Booch Formation for the underground storage of natural gas. Said Order No. 96291 included a provision that it was the certificate required by 52 O.S. 1961, Section 36.4, which is a condition precedent to the filing of a petition for condemnation in the courts of the State of Oklahoma. Maxwell Darks appealed the Corporation Commission's decision in Case No. 35868 to the Oklahoma Supreme Court, Supreme Court No. 46762, but this Honorable Court dismissed said appeal. Thereafter, in the District Court of Hughes County, State of Oklahoma, the Petitioner filed the following cases: Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, No. C-73-93; Transok Pipe Line Company, a corporation, v. Maxwell Darks, C-73-94; Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, C-73-95; and Transok Pipe Line Company, a corporation, v. Maxwell Darks, et al, C-73-100. Maxwell Darks petitioned this court for a Writ of Prohibition,

Supreme Court No. 46719, seeking a determination that the Corporation Commission of the State of Oklahoma, in Case No. 35,868, and the District Court of Hughes County, in the District Court cases C-73-93 through C-73-102, of which Maxwell Darks was a party only in C-73-93, C-73-94, C-73-95, and C-73-100, were, in these actions, asserting an unauthorized and unlawful exercise of judicial power. This Honorable Court denied Maxwell Darks' prayer for a Writ of Prohibition, and said District Court cases proceeded according to the provisions of 66 O.S. §§ 53-63. In each of the aforementioned Hughes County District Court cases, C-73-93, C-73-94, C-73-95, and C-73-100, Transok Pipe Line Company and Maxwell Darks filed their respective demands for a jury trial, and in each of the Hughes County cases, the District Court approved the Commissioners Report and confirmed the taking by condemnation. Maxwell Darks appealed the Hughes County District Court cases of C-73-93, C-73-94, and C-73-95 to the Oklahoma Supreme Court, Numbered by the Court, respectively, 48054, 48055, and 48056; said cases on appeal from the District Court of Hughes County are still pending before this Honorable Court. Maxwell Darks did not appeal the Hughes County District Court case of C-73-100. The jury trials in the Hughes County condemnation cases are pending subject to a decision by this Honorable Court in the aforementioned appeals; said pending jury trials, when held, will fully determine the rights of the condemnees and all damages to which they are entitled, incident to Petitioners taking in condemnation and its actions taken in furtherance of its underground gas storage project.

III.

On the 26th day of November, 1974, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed a trespass action in the District Court of Hughes County,

State of Oklahoma, No. C-74-251, praying for damages in the amount of $124,800, allegedly resulting from the supposed trespass of the Petitioner herein, Transok Pipe Line Company, a corporation. Proper notice was given the Defendant, Transok Pipe Line Company, and Petitioner entered its appearance on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that, " . . . the Petition does not state a cause of action against the Defendant in that the allegations made in such Petition are properly adjudicable in an action in eminent domain rather than tort, and that actions in eminent domain are presently pending before this court." Petitioner cited as its authority in support of said Demurrer the provisions of 66 O.S. 1910, §§ 51, 52, 54, 56, and 58; 66 O.S. 1973, § 53; 66 O.S. 1970, § 55; 66 O.S. 1929, § 57; 52 O.S. 1913, § 27; and the provisions of 52 O.S. 1951, §§ 36.1 through 36.7; and the case law authority of *Oklahoma City v. Wells*, 91 P2d 1077 (1939), and *Graham v. City of Duncan*, 354 P2d 458 (1960). On or about the 28th day of February, 1975, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed in the District Court Case C-74-251 their Amended Petition; however, the defect raised by the Demurrer of Transok Pipe Line Company was not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, on June 19, 1975, entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously overruled, to which ruling the Petitioner, herein, excepted and its exception was allowed.

IV.

That as a result of the Respondent's erroneous ruling in said trespass action, C-74-251, said cause will continue in the District Court of Hughes County, unless prohibited by this Honorable Court, and said Respondent will proceed to have said cause tried in the District Court of Hughes County, and will render a decision therein, despite the fact, that the District Court of Hughes County has pending before it the condemnation jury trials that will fully determine the damages prayed for in the trespass action; thereby, making it possible for the condemnees to obtain a *double recovery* for Petitioner's entry onto and taking of the property, in question, and Petitioner's actions taken thereon in furtherance of its underground gas storage project.

V.

That Petitioner is without an adequate remedy at law; that a remedy by appeal or by any other method except by prohibition is inadequate and insufficient; in that, said cause will improperly proceed in the District Court of Hughes County; that said Respondent assumes to exercise judicial power not granted by law, and is attempting to make unauthorized application of judicial force and power; that Respondent is attempting to proceed with this cause, when as a matter of law, said cause should have been dismissed pursuant to Petitioner's Demurrer, and that the Petitioner is without any ordinary and usual remedy, or equal remedy save that this Court issue its Writ of Prohibition.

WHEREFORE, your Petitioner prays this Honorable Court issue its Writ of Prohibition directed to the Honorable Frank Seay, Respondent, herein, commanding him to cease, desist, and refrain from proceeding further in his capacity as Judge of the District Court of Hughes

County in the case of Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co. v. Transok Pipe Line Company, No. C-74-251.

TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

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Telephone (918) 583-3611

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

VERIFICATION BY ATTORNEY

STATE OF OKLAHOMA }
COUNTY OF TULSA } ss

Charles B. Crane, being first duly sworn, deposes and says:

That he is one of the attorneys of record in the above entitled action; that he has personal knowledge of the facts of this cause, and that he has read the foregoing Petition for Writ of Prohibition, is familiar with the contents thereof, and believes that the facts therein set forth are true and correct.

/s/ Charles B. Crane
Charles B. Crane

Subscribed and sworn to before me this 17th day of July, 1975.

(SEAL)
My Commission expires:
2-5-78

/s/ Sharyn Manning
Notary Public

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma.

Supreme Ct. No. 48708
District Ct. No. C-74-250

BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

STATEMENT OF FACTS

Petitioner, Transok Pipe Line Company, a corporation, sought an Order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use, for the purpose of the underground storage of natural gas of the Channel Booch Formation underlying Hughes County (more particularly described in the Petition for Writ of Prohibition). The Corporation Commission, by Order No. 96291, granted Petitioner's Application, and held that the Channel Booch Formation was suitable for the underground storage of natural gas, and that Petitioner was authorized and empowered to use said formation for the underground storage of natural gas. Said Order No. 96291 included a provision that it was the certificate required by 52 O.S. 1961, § 36.4, which is a condition precedent to the filing of a petition for condemnation in the courts of the State of Oklahoma. Maxwell Darks appealed the Corporation Commission's decision in Case No. 35868 to the Oklahoma Supreme Court, Supreme Court No. 46762, but this Honorable Court dismissed said appeal.

Thereafter, in the District Court of Hughes County, State of Oklahoma, Petitioner filed a series of condemnation actions, and Maxwell Darks was a party in the actions numbered: C-73-93, C-73-94, C-73-95, and C-73-100. Maxwell Darks petitioned this Court for a Writ of Prohibition, Supreme Court No. 46719, seeking a determination that the Corporation Commission of the State of Oklahoma, in Case No. 35868, and the District Court of Hughes County, in the District Court cases of C-73-93 through C-73-102 (of which Darks was a party only in C-73-93, C-73-94, C-73-95, and C-73-100) were asserting in these actions an unauthorized and unlawful exercise of judicial power. This Honorable Court denied Maxwell Darks' prayer for a Writ of Prohibition, and said District Court cases proceeded according to the provisions of 66 O.S. Sections 53 - 60. In each of the aforementioned Hughes County District Court cases, C-73-93, C-73-94, C-73-95, and C-73-100, Transok Pipe Line Company and Maxwell Darks filed their respective demands for a jury trial, and in each of the Hughes County cases, the District Court approved the Commissioners' Report and confirmed the taking by condemnation. Maxwell Darks appealed the Hughes County District Court cases of C-73-93, C-73-94, and C-73-95, to the Oklahoma Supreme Court, numbered by the Court, respectively, 48054, 48055, and 48056; said cases, on appeal from the District Court of Hughes County, are still pending before this Honorable Court. The jury trials in the Hughes County condemnation cases are pending subject to a decision by this Honorable Court in the aforementioned appeals; said pending jury trials, when held, will fully determine the rights of the Condemnee and all damages to which he is entitled, incident to Petitioner's taking in condemnation and its actions taken in furtherance of its underground gas storage project.

On November 26, 1974, Maxwell Darks filed a trespass action in the District Court of Hughes County, State of Oklahoma, No. C-74-250, praying for damages in the amount of $130,000, allegedly resulting from the supposed trespass of the Petitioner, Transok Pipe Line Company, a corporation. Proper notice was given the Defendant, Transok Pipe Line Company, and Petitioner entered its appearance on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiff's Petition on the grounds that said Petition did not state a cause of action against the Defendant, because Plaintiff's exclusive remedy lay in the pending condemnation cases heretofore mentioned. On or about the 28th day of February, 1975, Maxwell Darks filed his Amended Petition; however, the defects raised by the Demurrer of Transok Pipe Line Company were not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of Hughes County, on June 19, 1975, which was entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously overruled, to which ruling the Petitioner excepted and its exception was allowed.

FIRST PROPOSITION

RESPONDENT ERRONEOUSLY OVERRULED PETITIONER'S DEMURRER, SINCE A CONDEMNEE'S EXCLUSIVE REMEDY IS IN A CONDEMNATION ACTION — THERE BEING NO CAUSE OF ACTION IN TORT.

Damages sustained by a landowner incident to a Condemnor's actions, are recoverable *only* in a *condemnation* proceeding. In the case of *Oklahoma City v.*

Wells, 91 P2d 1077 (1939), the Oklahoma Supreme Court decided the question of what remedy a landowner has when his property has been taken by a corporation endowed with the right of eminent domain. The Court stated in the Wells case, that the constitutional and statutory remedy of condemnation was a landowner's exclusive remedy. The Court explained, "In *Stedman v. State Highway Commission*, 174 Okl. 308, 50 P2d 657, it is held [page 658]: 'By the provisions of §§ 11931 - 11934, O.S. 1931, 66 Okl.St.Ann. §§ 53 - 56, the state has provided an adequate remedy for the determination of damages to private persons for property taken or damaged by the state for public use, and such remedy is exclusive.'" The Court further stated:

> In 10 R.C.L. § 190, p. 223, it is said: "It is settled by the great preponderance of authority, that when land is taken or damaged by authority of a constitutional statute and in compliance with its provisions, and the statute provides a means of recovering damages which may be instituted by the owner of the land, the statutory remedy is exclusive. When the act of the public authorities in entering upon and occupying private land, which they have taken by eminent domain in the manner provided by statute, or of making such use of land taken as will necessarily injure neighboring land, is expressly authorized by a statute which provides for the ascertainment and payment of just compensation, such an act is not in any sense wrongful or tortious and cannot be made the basis of an action of *trespass* or any other action sounding in tort. A common law action sounding in contract for the value of the land taken will not lie, for there is no implied contract to pay for it except in the manner provided by the statute: * * *." [Emphasis added]
>
> In the 1952 case of *Morton v. Okmulgee Producers*

and Manufacturers Gas Co., 248 P2d 1028 (1952), the Supreme Court of the State of Oklahoma decided an action involving a company endowed with the right of eminent domain. At p. 1029 of the *Morton* case, the Court stated:

> "Our Legislature has further provided in Title 66 O.S. 1941, § 57 that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings. This section gives the landowner the right, if the taking corporation does not follow the procedures set out, to condemn the property, to file his petition in the nature of condemnation to fix the damages to his land in the same manner and method as would be followed if the taking corporation filed condemnation procedure."

The Court then made reference to the case of *Oklahoma City v. Wells, supra*, holding that a landowner's exclusive remedy is in a condemnation proceeding.

In the case of *Graham v. City of Duncan*, 354 P2d 458 (1960), the Oklahoma Supreme Court decided an action against a municipality for the destruction of a crop. The Court held in the *Graham* case that even if there had been no necessity for the Condemnor's destroying the crop, the Condemnee's exclusive remedy was to have the amount of damages determined in a condemnation case, and that the Condemnee could not thereafter maintain an action for the damages, unless some items of damages had been removed from deter-

mination and reserved for future consideration by agreement between the parties, with the approval of the Court. (In the case at Bar, no items of damages were ever removed from determination in the above mentioned condemnation actions of Hughes County.) The Court stated in the *Graham* case that where the statutes have provided an adequate remedy for the determination of damages, resulting from the taking of property for public use, the statutory remedy is exclusive. The Court then quoted the case of *State of Oklahoma v. Adams*, 105 P2d 416 (1940):

> " ° ° ° that the owner must recover in one action 'all damages which have resulted, or are reasonably liable to result in the future, from a proper construction or operation of the improvement, and that no subsequent action will lie to recover for items which were, or might have been, considered in the original proceedings.' "

The Court also quoted Nichols on Eminent Domain, 3rd Ed. Vol. 6, § 24.2(3), pp. 36-37, " 'After judgment has been entered, it is conclusive as to all damages which were or might have been included in the award, and the owner cannot thereafter maintain an action in common law for such damages.' "

The items of damages to be considered in a condemnation jury trial, where defined by the Oklahoma Supreme Court in the case of *Cities Service Gas Company vs. Huebner*, 197 P2d 985 (1948). The Court held that the jury was to consider, in the valuation of condemnation damages, all resultant damages and such wrongful acts (including trespass and negligence) as were incidental to the condemnation works, if the works are completed prior to trial. (In the case at Bar, the Petitioner's taking and it's actions incident to its gas storage

project are already completed; hence, they have been completed prior to the pending jury trials in the condemnation actions and the damages prayed for in the trespass action will be considered by the jury at the condemnation trial.) The Court in the *Cities Service* case stated that it had, in earlier cases,

> " . . . pointed out that the condemnee is entitled to be fully compensated for his damages irrespective of negligence. In this connection see 124 A.L.R. 416, Note. Some of the cases holding that no allowance can be made for wilful or negligent acts were cases where the trial was had before the works were constructed, which is clearly correct, since damages for such acts that may not occur would be based entirely upon conjecture and speculation. We are committed to the rule that, where the trial is had after the works are completed, it is proper to assess the damages on the basis of the facts existing at the time of the trial, since the element of conjecture and speculation is then absent. State v. Winters, 195 Okl. 243, 156 P2d 798; Arkansas Valley & W. Ry. Co. v. Witt, 19 Okl. 262, 91 P. 897, 13 L.R.A., N.S., 237. The rule allowing the jury to consider the damages resulting from trespass or negligence, where the works are completed at the time of the trial, is based upon two reasons, (1) to avoid a multiplicity of suits as stated in Arkansas Missouri Power Co. v. Killian, 225 Mo. App. 454, 40 S.W.2d 730, 732, and to avoid placing an undue burden upon the condemnee, whose property is taken without his consent, and (2) that the condemnor should not be heard to urge its own wrongs to mitigate the damages, as said in United Power & Light Corporation v. Murphy, 135 Kan. 100, 9 P.2d 658, 663."

In 1974, the Oklahoma Supreme Court decided a case whose facts are very similar to the facts of the case

at Bar, *Delhi Gas Pipeline Corporation v. Swanson*, 520 P2d 670 (1974). In the *Delhi* case, Petitioner was a gas pipeline corporation that had entered upon the Condemnee's land and started construction of a pipeline; thereafter, Delhi filed a condemnation proceeding in which the Report of the Commissioners was approved and the District Court determined that Delhi had the right to exercise the power of eminent domain and that the taking was necessary. Subsequent to the District Court condemnation action, the landowners filed suit against Delhi alleging that the Company was guilty of trespass and sought actual and punitive damages, and injunctive relief. Delhi filed its Demurrer and Motion To Dismiss in the trespass action on the grounds that the Condemnees were required to recover their damages in the pending condemnation proceedings, and on the grounds that the Court did not have jurisdiction of the subject matter and that the Petition failed to state sufficient facts to constitute a cause of action. (In the case at Bar, Petitioner's Demurrer attacked Condemnee's Petition on the grounds that the Condemnee's rights were properly adjudicable in the pending eminent domain actions and that the Petition did not state a cause of action.) The trial court in the Delhi case overruled Delhi's Demurrer and Motion To Dismiss and set the case for jury trial; whereupon, Delhi sought a Writ of Prohibition to prevent the trial court from proceeding further with the landowners' trespass action. The Oklahoma Supreme Court held that the landowner could recover in a condemnation proceeding for all the land taken or damaged by the Condemnor, Delhi Gas Pipeline Corporation, and that the condemnation proceeding was the only place where the landowners could recover damages. The Court cited the holding in the *Graham v. City of Duncan* case, *supra*, — a Condemnee must make his

total recovery, for all the damages that have resulted or are reasonably liable to result in the future from the Condemnor's taking, in an eminent domain proceeding, and that no subsequent action, such as a trespass action, would lie. The Court also cited the holding in *Cities Service Gas Co. v. Huebner, supra*, "In Cities Service Gas Co. v. Huebner, 200 Okl. 521, 197 P2d 985, we held that in situations where the works have been completed prior to trial in the condemnation proceeding, the condemnee may recover in the condemnation proceeding for all of his damages, irrespective of negligence."

It is apparent from the authorities cited above, that a Condemnee's *sole* remedy for any and all damages incident to a Condemnor's taking of the landowner's property, is in a condemnation action. No cause of action at common law, including trespass, may be resorted to by the landowner. In the case at Bar, the damages of the Condemnee prayed for in the trespass action will be fully determined in the pending Hughes County condemnation jury trials. Since the Condemnee's sole remedy is in the pending eminent domain jury trial, and since it has been held that a trespass action will not lie for damages resulting from a Condemnor's taking by condemnation, the Honorable Frank Seay, Judge of the District Court of Hughes County, was in error in overruling Petitioner's Demurrer in the case of *Maxwell Darks v. Transok Pipe Line Company*, a corporation, C-74-250.

SECOND PROPOSITION

A WRIT OF PROHIBITION SHOULD BE ISSUED SINCE RESPONDENT WAS IN ERROR IN OVERRULING PETITIONER'S DEMURRER.

Under a clear line of Oklahoma authority, the Supreme Court, in an original jurisdiction proceeding, pur-

suant to its constitutional power of superintending control, can issue a Writ of Prohibition to restrain the further prosecution of a case, after a lower court has erroneously failed to sustain a Demurrer. In the case of *Board of Commissioners of Harmon County* v. *Keen*, 153 P2d 483 (1944), the Court issued a Writ of Prohibition to the Judge of the District Court of Harmon County, who had erroneously overruled Defendant's Demurrer to a tort action. The Court, having determined that the Plaintiff had no cause of action in tort against the Defendant, stated, "We have long been committed to the rule that 'prohibition is the proper remedy, where an inferior court assumes to exercise judicial power not granted by law, or is attempting to make an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by it.' *State ex rel Haskell* v. *Huston*, 21 Okl. 782, 97 P. 982." The Court then stated that no cause of action existed nor could one be stated and that a Writ of Prohibition should be issued as prayed for. In the 1970 case of *Hyman-Michaels Co.* v. *Hampton*, 471 P2d 463 (1970), the Supreme Court of the State of Oklahoma again held that prohibition was the proper remedy to restrain a court from proceeding further in an action, after erroneously refusing to sustain a Demurrer. In the previously discussed case of *Delhi Gas Pipeline Corporation* v. *Swanson*, *supra*, the Supreme Court, having determined that the Condemnees' damages were to be determined solely in the pending condemnation action, issued a Writ of Prohibition to Judge Swanson, Judge of the District Court of Blaine County, because he had overruled Delhi's Demurrer to the trespass action.

CONCLUSION

The authorities cited above hold:

(1) A Condemnee's exclusive remedy is in a condemnation proceeding;

(2) No common law cause of action, such as trespass, will lie for the taking of property by condemnation, and

(3) A Writ of Prohibition should be issued when a Demurrer is erroneously overruled.

In the case at Bar, Maxwell Darks' exclusive remedy for *all* his damages sustained as a result of Petitioner's taking by condemnation, lies in the condemnation jury trials currently pending before the District Court of Hughes County. Pursuant to the above authorities, Maxwell Darks does *not* have a cause of action in trespass against the Petitioner, Transok Pipe Line Company. No cause of action can be stated in trespass, as no cause of action exists in trespass against a Condemnor. The Respondent's failure to sustain Petitioner's Demurrer was clearly erroneous; consequently, the Respondent is attempting to exercise judicial power not granted by law and is attempting to make an unauthorized application of judicial force and power by attempting to proceed with this action. As a result of the Respondent's actions, the trespass action will continue, as will the condemnation actions, and it will be possible for the Condemnee to obtain a *double recovery* for Petitioner's completed works incident to Petitioner's entry onto and taking of the property, in question, and Petitioner's actions taken thereon in furtherance of its underground gas storage project. Subsequent to the Respondent's erroneous overruling of Petitioner's Demurrer, the Petitioner is without any remedy, whatsoever, save this Court issue its Writ of Prohibition directing the Honorable Frank Seay, Judge of the District Court of Hughes County, to cease, desist, and refrain from proceeding further in the case of *Maxwell Darks v. Transok Pipe Line Company*, C-74-250.

THEREFORE, pursuant to the law and the facts of the case at Bar, Petitioner respectfully requests that this Honorable Court issue its Writ of Prohibition as prayed for.

RESPECTFULLY SUBMITTED,

TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

P. O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma

Supreme Ct. No. 48709
District Ct. No. C-74-251

BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

STATEMENT OF FACTS

Petitioner, Transok Pipe Line Company, a corporation, sought an Order of the Oklahoma Corporation Commission, in Cause No. 35868, authorizing the use, for the purpose of the underground storage of natural gas of the Channel Booch Formation underlying Hughes County (more particularly described in the Petition for Writ of Prohibition). The Corporation Commission, by Order No. 96291, granted Petitioner's Application, and held that the Channel Booch Formation was suitable for the underground storage of natural gas, and that Petitioner was authorized and empowered to use said formation for the underground storage of natural gas. Said Order No. 96291 included a provision that it was the certificate required by 52 O.S. 1961, § 36.4, which is a condition precedent to the filing of a petition for condemnation in the courts of the State of Oklahoma. Maxwell Darks appealed the Corporation Commission's decision in Case No. 35868 to the Oklahoma Supreme Court, Supreme Court No. 46762, but this Honorable Court dismissed said appeal.

Thereafter, in the district Court of Hughes County, State of Oklahoma, Petitioner filed a series of condemnation actions, and Maxwell Darks was a party in the actions numbered: C-73-93, C-73-94, C-73-95, and C-73-100. Maxwell Darks petitioned this Court for a Writ of Prohibition, Supreme Court No. 46719, seeking a determination that the Corporation Commission of the State of Oklahoma, in Case No. 35868, and the District Court of Hughes County, in the District Court cases of C-73-93 through C-73-102 (of which Darks was a party only in C-73-93, C-73-94, C-73-95, and C-73-100) were asserting in these actions an unauthorized and unlawful exercise of judicial power. This Honorable Court denied Maxwell Darks' prayer for a Writ of Prohibition, and said District Court cases proceeded according to the provisions of 66 O.S. §§ 53-60. In each of the aforementioned Hughes County District Court cases, C-73-93, C-73-94, C-73-95, and C-73-100, Transok Pipe Line Company, and Maxwell Darks filed their respective demands for a jury trial, and in each of the Hughes County cases, the District Court approved the Commissioners' Report and confirmed the taking by condemnation. Maxwell Darks appealed the Hughes County District Court cases of C-73-93, C-73-94, and C-73-95, to the Oklahoma Supreme Court, numbered by the Court, respectively, 48054, 48055, and 48056; said cases, on appeal from the District Court of Hughes County, are still pending before this Honorable Court. The jury trials in the Hughes County condemnation cases are pending subject to a decision by this Honorable Court in the aforementioned appeals; said pending jury trials, when held, will fully determine the rights of the condemnees and all damages to which they are entitled, incident to Petitioner's taking in condemnation and its actions taken in furtherance of its underground gas storage project.

On November 26, 1974, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed a trespass action in the District Court of Hughes County, State of Oklahoma, No. C-74-251, praying for damages in the amount of $124,800, allegedly resulting from the supposed trespass of the Petitioner, Transok Pipe Line Company, a corporation. Proper notice was given the Defendant, Transok Pipe Line Company, and Petitioner entered its appearance on December 26, 1974. Thereafter, on the 24th day of January, 1975, Transok Pipe Line Company filed its Demurrer to Plaintiffs' Petition on the grounds that said Petition did not state a cause of action against the Defendant, because Plaintiffs' exclusive remedy lay in the pending condemnation cases heretofore mentioned. On or about the 28th day of February, 1975, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., filed their Amended Petition; however, the defects raised by the Demurrer of Transok Pipe Line Company were not cured by said Amended Petition, and on the 19th day of June, 1975, the Demurrer of Transok Pipe Line Company was argued before the Honorable Frank Seay. By Order of the Honorable Frank Seay, Judge of the District Court of Hughes County, on June 19, 1975, which was entered and filed on the 26th day of June, 1975, Petitioner's Demurrer was erroneously overruled, to which ruling the Petitioner excepted and its exception was allowed.

FIRST PROPOSITION

RESPONDENT ERRONEOUSLY OVERRULED PETITIONER'S DEMURRER, SINCE A CONDEMNEE'S EXCLUSIVE REMEDY IS IN A CONDEMNATION ACTION — THERE BEING NO CAUSE OF ACTION IN TORT.

Damages sustained by a landowner incident to a Condemnor's actions, are recoverable *only* in a *condemnation* proceeding. In the case of *Oklahoma City v. Wells*, 91 P2d 1077 (1939), the Oklahoma Supreme Court decided the question of what remedy a landowner has when his property has been taken by a corporation endowed with the right of eminent domain. The Court stated in the *Wells* case, that the constitutional and statutory remedy of condemnation was a landowner's exclusive remedy. The Court explained, "In *Stedman v. State Highway Commission*, 174 Okl. 308, 50 P2d 657, it is held [page 658]: 'By the provisions of §§ 11931-11934, O.S. 1931, 66 Okl. St.Ann. §§ 53-56, the state has provided an adequate remedy for the determination of damages to private persons for property taken or damaged by the state for public use, and such remedy is exclusive.' " The Court further stated:

> In 10 R.C.L. § 190, p. 223, it is said: "It is settled by the great preponderance of authority, that when land is taken or damaged by authority of a constitutional statute and in compliance with its provisions, and the statute provides a means of recovering damages which may be instituted by the owner of the land, the statutory remedy is exclusive. When the act of the public authorities in entering upon and occupying private land, which they have taken by eminent domain in the manner provided by statute, or of making such use of land taken as will necessarily injure neighboring land, is expressly authorized by a statute which provides for the ascertainment and payment of just compensation, such an act is not in any sense wrongful or tortious and cannot be made the basis of an action of *trespass* or any other action sounding in tort. A common law action sounding in contract for the value of the land taken will not lie, for there is no implied

contract to pay for it except in the manner provided by the statute; * * *." [Emphasis added]

In the 1952 case of *Morton v. Okmulgee Producers and Manufacturers Gas Co.*, 248 P2d 1028 (1952), the Supreme Court of the State of Oklahoma decided an action involving a company endowed with the right of eminent domain. At p. 1029 of the *Morton* case, the Court stated:

> "Our Legislature has further provided in Title 66 O.S. 1941, § 57 that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings. This section gives the landowner the right, if the taking corporation does not follow the procedures set out, to condemn the property, to file his petition in the nature of condemnation to fix the damages to his land in the same manner and method as would be followed if the taking corporation filed condemnation procedure."

The Court then made reference to the case of *Oklahoma City v. Wells, supra*, holding that a landowner's exclusive remedy is a condemnation proceeding.

In the case of *Graham v. City of Duncan*, 354 P2d 458 (1960), the Oklahoma Supreme Court decided an action against a municipality for the destruction of a crop. The Court held in the *Graham* case that even if there had been no necessity for the Condemnor's destroying the crop, the Condemnee's exclusive remedy was to have the amount of damages determined in a

condemnation case, and that the Condemnee could not thereafter maintain an action for the damages, unless some items of damages had been removed from determination and reserved for future consideration by agreement between the parties, with the approval of the Court. (In the case at Bar, no items of damages were ever removed from determination in the above mentioned condemnation actions of Hughes County.) The Court stated in the *Graham* case that where the statutes have provided an adequate remedy for the determination of damages, resulting from the taking of property for public use, the statutory remedy is exclusive. The Court then quoted the case of *State of Oklahoma v. Adams*, 105 P2d 416 (1940):

> "•••that the owner must recover in one action 'all damages which have resulted, or are reasonably liable to result in the future, from a proper construction or operation of the improvement, and that no subsequent action will lie to recover for items which were, or might have been, considered in the original proceedings.' "

The Court also quoted Nichols on Eminent Domain, 3rd Ed. Vol. 6, § 24.2(3), pp. 36-37, " 'After judgment has been entered, it is conclusive as to all damages which were or might have been included in the award, and the owner cannot thereafter maintain an action in common law for such damages.' "

The items of damages to be considered in a condemnation jury trial, where defined by the Oklahoma Supreme Court in the case of *Cities Service Gas Company vs. Huebner*, 197 P2d 985 (1948). The Court held that the jury was to consider, in the valuation of condemnation damages, all resultant damages and such wrongful acts (including trespass and negligence) as were incidental to the condemnation works, if the works are

completed prior to trial. (In the case at Bar, the Petitioner's taking and it's actions incident to its gas storage project are already completed; hence, they have been completed prior to the pending jury trials in the condemnation actions and the damages prayed for in the trespass action will be considered by the jury at the condemnation trial.) The Court in the *Cities Service* case stated that it had, in earlier cases,

> ". . . pointed out that the condemnee is entitled to be fully compensated for his damages irrespective of negligence. In this connection see 124 A.L.R. 416, Note. Some of the cases holding that no allowance can be made for wilful or negligent acts were cases where the trial was had before the works were constructed, which is clearly correct, since damages for such acts that may not occur would be based entirely upon conjecture and speculation. We are committed to the rule that, where the trial is had after the works are completed, it is proper to assess the damages on the basis of the facts existing at the time of the trial, since the element of conjecture and speculation is then absent. State v. Winters, 195 Okl. 243, 156 P.2d 798; Arkansas Valley & W. Ry. Co. v. Witt, 19 Okl. 262, 91 P. 897 13 L.R.A.,N.S., 237. The rule allowing the jury to consider the damages resulting from trespass or negligence, where the works are completed at the time of trial, is based upon two reasons, (1) to avoid a multiplicity of suits as stated in Arkansas Missouri Power Co. v. Killian, 225 Mo. App. 454,40 S.W.2d 730, 732, and to avoid placing an undue burden upon the condemnee, whose property is taken without his consent, and (2) that the condemnor should not be heard to urge its own wrongs to mitigate the damages, as said in United Power & Light Corporation v. Murphy, 135 Kan. 100, 9 P.2d 658, 663."

In 1974, the Oklahoma Supreme Court decided a case whose facts are very similar to the facts of the case at Bar, *Delhi Gas Pipeline Corporation v. Swanson*, 520 P2d 670 (1974). In the *Delhi* case, Petitioner was a gas pipeline corporation that had entered upon the Condemnee's land and started construction of a pipeline; thereafter, Delhi filed a condemnation proceeding in which the Report of the Commissioners was approved and the District Court determined that Delhi had the right to exercise the power of eminent domain and that the taking was necessary. Subsequent to the District Court condemnation action, the land-owners filed suit against Delhi alleging that the Company was guilty of trespass and sought actual and punitive damages, and injunctive relief. Delhi filed its Demurrer and Motion To Dismiss in the trespass action on the ground that the Condemnees were required to recover their damages in the pending condemnation proceedings, and on the grounds that the Court did not have jurisdiction of the subject matter and that the Petition failed to state sufficient facts to constitute a cause of action. (In the case at Bar, Petitioner's Demurrer attacked Condemnees' Petition on the grounds that the Condemnees' rights were properly adjudicable in the pending eminent domain actions and that the Petition did not state a cause of action.) The trial court in the *Delhi* case overruled Delhi's Demurrer and Motion to Dismiss and set the case for jury trial; whereupon, Delhi sought a Writ of Prohibition to prevent the trial court from proceeding further with the landowners' trespass action. The Oklahoma Supreme Court held that the landowner could recover in a condemnation proceeding for all the land taken or damaged by the condemnor, Delhi Gas Pipeline Corporation, and that the condemnation proceeding was the only place where the landowners could recover

damages. The court cited the holding in the *Graham v. City of Duncan* case, *supra*, - a Condemnee must make his total recovery, for all the damages that have resulted or are reasonably liable to result in the future from the Condemnor's taking, in an eminent domain proceeding, and that no subsequent action, such as a trespass action, would lie. The Court also cited the holding in *Cities Service Gas Co. v. Huebner, supra*, "In *Cities Service Gas Co. v. Huebner*, 200 Okl. 521, 197 P.2d 985, we held that in situations where the works have been completed prior to trial in the condemnation proceeding, the condemnee may recover in the condemnation proceeding for all of his damages, irrespective of negligence."

It is apparent from the authorities cited above, that a Condemnee's *sole* remedy for any and all damages incident to a Condemnor's taking of the landowner's property, is in a condemnation action. No cause of action at common law, including trespass, may be resorted to by the landowner. In the case at Bar, the damages of the Condemnees prayed for in the trespass action will be fully determined in the pending Hughes County condemnation jury trials. Since the Condemnees' sole remedy is in the pending eminent domain jury trial, and since it has been held that a trespass action will not lie for damages resulting from a Condemnor's taking by condemnation, the Honorable Frank Seay, Judge of the District Court of Hughes County, was in error in overruling Petitioner's Demurrer in the case of *Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co.*, a corporation, C-74-251.

SECOND PROPOSITION

A WRIT OF PROHIBITION SHOULD BE ISSUED SINCE RESPONDENT WAS IN ERROR IN OVERRULING PETITIONER'S DEMURRER.

Under a clear line of Oklahoma authority, the Supreme Court, in an original jurisdiction proceeding, pursuant to its constitutional power of superintending control, can issue a Writ of Prohibition to restrain the further prosecution of a case, after a lower court has erroneously failed to sustain a Demurrer. In the case of *Board of Commissioners of Harmon County v. Keen* 153 P2d 483 (1944), the Court issued a Writ of Prohibition to the Judge of the District Court of Harmon County, who had erroneously overruled Defendant's Demurrer to a tort action. The Court, having determined that the Plaintiff had no cause of action in tort against the Defendant, stated, "We have long been committed to the rule that 'prohibition is the proper remedy, where an inferior court assumes to exercise judicial power not granted by law, or is attempting to make an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by it.' *State ex rel Haskell v. Huston*, 21 Okl. 782, 97 P. 982." The Court then stated that no cause of action existed nor could one be stated and that a Writ of Prohibition should be issued as prayed for. In the 1970 case of *Hyman-Michaels Co. v. Hampton*, 471 P2d 463 (1970), the Supreme Court of the State of Oklahoma again held that prohibition was the proper remedy to restrain a court from proceeding further in an action, after erroneously refusing to sustain a Demurrer. In the previously discussed case of *Delhi Gas Pipeline Corporation v. Swanson, supra*, the Supreme Court, having determined that the Condemnees' damages were to be determined solely in the pending condemnation action, issued a Writ of Prohibition to Judge Swanson, Judge of the District Court of Blaine County, because he had overruled Delhi's Demurrer to the trespass action.

CONCLUSION

The authorities cited above hold:

(1) A Condemnee's exclusive remedy is in a condemnation proceeding;

(2) No common law cause of action, such as trespass, will lie for the taking of property by condemnation, and

(3) A Writ of Prohibition should be issued when a Demurrer is erroneously overruled.

In the case at Bar, the exclusive remedy of Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Co., for *all* their damages sustained as a result of Petitioner's taking by condemnation, lies in the condemnation jury trials currently pending before the District Court of Hughes County. Pursuant to the above authorities, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., do *not* have a cause of action in trespass against the Petitioner, Transok Pipe Line Company. No cause of action can be stated in trespass, as no cause of action exists in trespass against a Condemnor. The Respondent's failure to sustain Petitioner's Demurrer was clearly erroneous; consequently, the Respondent is attempting to exercise judicial power not granted by law and is attempting to make an unauthorized application of judicial force and power by attempting to proceed with this action. As a result of the Respondent's actions, the trespass action will continue, as will the condemnation actions, and it will be possible for the Condemnees to obtain a *double recovery* for Petitioner's completed works incident to Petitioner's entry onto and taking of the property, in question, and Petitioner's actions taken thereon in furtherance of its underground gas storage project. Subsequent to the Respondent's erroneous overruling of Petitioner's Demurrer, the Petitioner is without

any remedy, whatsoever, save this Court issue its Writ of Prohibition directing the Honorable Frank Seay, Judge of the District Court of Hughes County, to cease, desist, and refrain from proceeding further in the case of *Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., v. Transok Pipe Line Company*, No. C-74-251.

THEREFORE, pursuant to the law and the facts of the case at Bar, Petitioner respectfully requests that this Honorable Court issue its Writ of Prohibition as prayed for.

Respectfully submitted,

TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

P. O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY
a corporation,
Petitioner
vs.
FRANK SEAY, the Honorable Judge
of the District Court of the
22nd Judicial District, County
of Hughes, States of Oklahoma,
Respondent.

Supreme Ct.
No. 48708
District Ct.
No. C-74-250

NOTICE

TO: Frank Seay, the Honorable Judge of the District Court of Hughes County, State of Oklahoma, and Maxwell Darks

Take notice that on the following Application to Assume Original Jurisdiction, verified Petition for Writ of Prohibition, and Brief in Support of Petition for Writ of Prohibition, copies of which are attached hereto, the Petitioner, Transok Pipe Line Company, a corporation, will move the Supreme Court of the State of Oklahoma on the 5th day of August, 1975, at 1:30 o'clock a.m., at the opening court of that day, or as soon thereafter as counsel can be heard, for an Alternative Writ of Prohibition to issue out of said Court directed to the Honorable Frank Seay, Judge of the District Court of Hughes County, and Maxwell Darks, ordering them to desist and refrain from any further proceedings in the action entitled and numbered: Maxwell Darks, Plaintiff,

v. Transok Pipe Line Company, Defendant, C-74-250, and for such other relief as may be just.

TRANSOK PIPE LINE COMPANY,
Petitioner

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel

P. O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma,
Respondent.

Supreme Ct. No. 48709
District Ct. No. C-74-251

NOTICE

TO: Frank Seay, the Honorable Judge of the District Court of Hughes County, State of Oklahoma, and Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co.

Take notice that on the following Application to Assume Original Jurisdiction, verified Petition for Writ of Prohibition, and Brief in Support of Petition for Writ of Prohibition, copies of which are attached hereto, the Petitioner, Transok Pipe Line Company, a corporation, will move the Supreme Court of the State of Oklahoma on the 5th day of August, 1975, at 1:30 o'clock a.m., at the opening court of that day, or as soon thereafter as counsel can be heard, for an Alternative Writ of Prohibition to issue out of said court directed to the Honorable Frank Seay, Judge of the District Court of Hughes County, and Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Co., ordering them to desist and refrain from any further proceedings in the action entitled and numbered: Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., Plaintiff, v. Transok Pipe

Line Company, Defendant, C-74-251, and for such other relief as may be just.

TRANSOK PIPE LINE COMPANY
Petitioner

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel

P. O. Box 201
Tulsa, OK 74102
Telephone (918) 583-3611

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma,
Respondent.

Supreme Ct. No. 48708
Dist. Ct. No. C-74-250

AFFIDAVIT OF SERVICE

Kevin M. Abel, of lawful age, being first duly sworn, deposes and says:

That I am an attorney for the Petitioner in the above entitled cause, and that on the 18th day of July, 1975, I provided for the delivery of a true and correct copy of Petitioner's Application to Assume Original Jurisdiction, Petition for Writ of Prohibition, Brief in Support of Petition for Writ of Prohibition, and Notice thereof, to the Honorable Frank Seay, Respondent, Hughes County Court House, Holdenville, Oklahoma, and to Robert G. Grove and Carl Michael Smith, attorneys for Maxwell Darks, 324 N. Robinson, Suite 300, Oklahoma City, Oklahoma.

/s/ Kevin M. Abel
Kevin M. Abel
Attorney for Transok Pipe Line Company, Petitioner

P.O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

Subscribed and sworn to before me this 17th day of July, 1975.

/s/ Sharyn Manning
Notary Public

(SEAL)

My Commission expires: 2-5-78

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY
a corporation,
Petitioner,
vs.
FRANK SEAY, the Honorable Judge
of the District Court of the
22nd Judicial District, County
of Hughes, State of Oklahoma,
Respondent.

Supreme Ct.
No. 48709

District Ct.
No. C-74-251

AFFIDAVIT OF SERVICE

Kevin M. Abel, of lawful age, being first duly sworn, deposes and says:

That I am an attorney for the Petitioner in the above entitled cause, and that on the 18th day of July, 1975, I provided for the delivery of a true and correct copy of Petitioner's Application to Assume Original Jurisdiction, Petition for Writ of Prohibition, Brief in Support of Petition for Writ of Prohibition, and Notice thereof, to the Honorable Frank Seay, Respondent, Hughes County Court House, Holdenville, Oklahoma, and to Robert G. Grove and Carl Michael Smith, attorneys for Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Co., 324 N. Robinson, Suite 300, Oklahoma City, Oklahoma.

/s/ Kevin M. Abel
Kevin M. Abel
Attorney for Transok Pipe Line
Company, Petitioner

P. O. Box 201
Tulsa, OK 74102
Telephone: (918) 583-3611

Subscribed and sworn to before me this 17th day of July, 1975.

/s/ Sharyn Manning
Notary Public

(SEAL)

My Commission expires: 2-5-78

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY a corporation v. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma	No. 48,708 No. 48,709

ORDER

For good cause this Court stays all future hearings or other actions by the Honorable Frank Seay, District Judge of Hughes County, Oklahoma, until the further order of this Court.

STAY GRANTED

DONE IN CONFERENCE this 21st day of July, 1975.

/s/ Ben T. Williams
Chief Justice

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY a corporation Petitioner vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma Respondent	Supreme Ct. No. 48708 District Ct. No. C-74-250

MOTION TO DENY APPLICATION TO ASSUME ORIGINAL JURISDICTION AND MOTION TO DISMISS PETITION FOR WRIT OF PROHIBITION

COMES NOW Maxwell Darks by and through his attorneys and moves this honorable court to deny Petitioner's Application to Assume Original Jurisdiction, and issue a Writ of Prohibition directed to the Respondent herein, Frank Seay, the Honorable Judge of the District Court of the Twenty-Second Judicial District, County of Hughes, State of Oklahoma, and further moves this honorable court to dismiss the Petition for Writ of Prohibition filed herein by the Petitioner, for the following reasons:

I

The subject matter of this cause is not related to the subject matter of the Hughes County District Court cases, No.'s C-73-93 through C-73-102 (of which Maxwell Darks, individually, is a party in cases C-73-93, C-73-94, C-73-95, and C-73-100) all as previously admitted in open court by Petitioner.

II

That the alleged acts of trespass in this cause are in no way related to the allegation and averments of Petitioner in its Petition for Writ of Prohibition.

III

Petitioner seeks in its Petition and Application to Assume Jurisdiction affirmative relief which, under the set of facts therein alleged, this honorable court cannot grant by the extraordinary Writ of Prohibition.

IV

That Petitioner has an adequate remedy at law through the procedures prescribed by the Statutes of the State of Oklahoma whereby his rights will be protected and all of the issues raised by Petitioner in its Petition and Application to Assume Jurisdiction may be determined if applicable.

WHEREFORE, Maxwell Darks, for himself and on behalf of the Respondent, Frank Seay, the Honorable Judge of the District Court of the Twenty-Second Judicial District, County of Hughes, State of Oklahoma, pray this court to enter its Order denying Application to Assume Jurisdiction and dismissing the Petition for Writ of Prohibition filed herein.

/s/ Robert G. Grove
Robert G. Grove

/s/ Carl Michael Smith
Carl Michael Smith

324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorneys for Maxwell Darks

CERTIFICATE OF MAILING

I, Carl Michael Smith, attorney for Maxwell Darks, do hereby certify that I have this 28th day of July,

1975, mailed a true and correct copy of the above and foregoing Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition to:

Mr. Robert Lawrence & Mr. Charles Crane
P. O. Box 201
Tulsa, Oklahoma 74102

Honorable Frank Seay
District Judge
Hughes County Courthouse
Holdenville, Oklahoma 74848

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY
a corporation
Petitioner
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma
Respondent

Supreme Ct. No. 48709
District Ct. No. C-74-251

MOTION TO DENY APPLICATION TO ASSUME ORIGINAL JURISDICTION AND MOTION TO DISMISS PETITION FOR WRIT OF PROHIBITION

COMES NOW Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company by and through its attorneys and moves this honorable court to deny Petitioner's Application to Assume Original Jurisdiction, and issue a Writ of Prohibition direction to the Respondent herein, Frank Seay, the Honorable Judge of the District Court of the Twenty-Second Judicial District, County of Hughes, State of Oklahoma, and further moves this honorable court to dismiss the Petition for Writ of Prohibition filed herein by the Petitioner, for the following reasons:

I

The Petition shows on its face that the allegations and averments therein contained do not pertain to the partnership entity of Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company.

II

That the alleged acts of trespass in this cause are in no way related to the allegations and averments of Petitioner, in its Petition for Writ of Prohibition.

III

Petitioner seeks in its Petition and Application to Assume Jurisdiction affirmative relief which, under the set of facts therein alleged, this honorable court cannot grant by the extraordinary Writ of Prohibition.

IV

That Petitioner has an adequate remedy at law through the procedures prescribed by the Statutes of the State of Oklahoma whereby its rights will be protected and all of the issues raised by Petitioner in its Petition and Application to Assume Jurisdiction may be determined if applicable.

WHEREFORE, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company for itself and on behalf of the Respondent, Frank Seay, the Honorable Judge of the District Court of the Twenty-Second Judicial District, County of Hughes, State of Oklahoma, pray this court to enter its Order denying Application to Assume Jurisdiction and dismissing the Petition for Writ of Prohibition filed herein.

/s/ Robert G. Grove
Robert G. Grove

/s/ Carl Michael Smith
Carl Michael Smith

324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorneys for Maxwell Darks
and Les Starks d/b/a Greasy
Creek Cattle Company

CERTIFICATE OF MAILING

I, Carl Michael Smith, attorney for Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company, do hereby certify that I have this 28th day of July, 1975, mailed a true and correct copy of the above and foregoing Motion to Deny Application to Assume Original Jurisdiction and Motion to Dismiss Petition for Writ of Prohibition to:

Mr. Robert Lawrence & Mr. Charles Crane
P. O. Box 201
Tulsa, Oklahoma 74102

Honorable Frank Seay
District Judge
Hughes County Courthouse
Holdenville, Oklahoma 74848

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation
Petitioner
vs.
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma
Respondent

Supreme Ct. No. 48708
District Ct. No. C-74-250

BRIEF IN SUPPORT OF MOTION TO DENY APPLICATION TO ASSUME ORIGINAL JURISDICTION AND MOTION TO DISMISS PETITION FOR WRIT OF PROHIBITION

STATEMENT OF THE CASE

On November 26, 1974, Maxwell Darks filed a trespass action in the District Court of Hughes County, State of Oklahoma, Number C-74-250, as a result of a trespass by the Defendant therein, and Petitioner herein, Transok Pipe Line Company. The essential allegations of said Petition were to the effect that Defendant, by and through its duly authorized agents, trespassed upon the lands of Plaintiff at various times during the months of April and May, 1973. The Petition further alleged that the Defendant filed a series of condemnation actions in the District Court of Hughes County, State of Oklahoma, No.s C-73-93 through C-73-102; that in accord with the report of commissioners in those condemnation cases, the Petitioner herein deposited a sum of money awarded to the Plaintiff, Maxwell Darks, on or about the 25th

day of June, 1973. However, that due to the acts of Petitioner, Plaintiff, Maxwell Darks, was unable to withdraw the sum of money awarded by the commissioners until December 13, 1974. Plaintiff, Maxwell Darks, further alleged acts of trespass by the Defendant and Petitioner in that it caused foreign natural gas to be injected into the lands of Plaintiff.

On January 24, 1975, Defendant and Petitioner filed its Demurrer to Plaintiff's Petition on the grounds that the Petition does not state a cause of action against the Defendant, and that there was another action pending between the parties. Plaintiff thereafter amended his Petition, and the Demurrer as to Plaintiff's Amended Petition was heard by the trial court on the 19th day of June, 1975. The Honorable Frank Seay, Judge of the District Court of Hughes County, overruled Defendant and Petitioner's Demurrer and allowed exceptions to said ruling. The trial court's ruling was based at least in part on Defendant and Petitioner's successful argument to the trial court in the condemnation cases that elements of damage for trespass were not proper in a condemnation suit, and if such trespass took place, a separate action at law would have to be filed. (Pages 43-44, Transcript of proceedings, Case No.s C-73-93, C-73-94, and C-73-95; Supreme Court No.s 48,054, 48,055, and 48,056). The trial court agreed with Defendant and Petitioner's earlier argument, and in overruling the Demurrer sustained that argument (pages 10-14, Transcript of Proceedings on Demurrer.)

ARGUMENT AND AUTHORITY

Proposition I

RESPONDENT WAS CORRECT IN OVERRULING PETITIONER'S DEMURRER

Petitioner makes no argument that the allegations

and averments contained in Plaintiff's Petition are insufficient to state a cause of action. Rather, Petitioner bottoms its argument that the Respondent should have sustained its Demurrer to Plaintiff's Amended Petition based on the fact that there is another action pending between the parties in which Plaintiff can be afforded full and complete relief. Petitioner cites the condemnation suits in Hughes County District Court, No.s C-73-93 through C-73-102 (of which Maxwell Darks, individually, is a party in cases C-73-93, C-73-94, C-73-95 and C-73-100). Petitioner, however, neglects to advise this honorable court that it successfully argued that the cause of action herein alleged was not properly maintainable in these various condemnation suits, and if said trespass did in fact occur, this Plaintiff would have an adequate remedy at law through a separate trespass action. Plaintiff merely took Petitioner's advice, and filed this action following the trial court's ruling in the condemnation cases to that same effect. In addition, Plaintiff maintains that his Amended Petition in this cause clearly states two separate and distinct causes of action for trespass against the Defendant and Petitioner, even though same are not separately denoted as such. First, Paragraphs II, III, and IV refer to actual trespass on the surface of the land prior to Defendant and Petitioner posting any award by commissioners on June 25, 1973. *Article 2, § 24 of the Oklahoma Constitution* states, in part, as follows:

> "Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, . . ."

Plaintiff maintains that any entry upon his land by Defendant and Petitioner before the critical date of June 25, 1973, amounts to a trespass actionable at law. To further compound the situation, the Defendant and Petitioner deliberately posted the commissioners' award on June 25, 1973, in such a manner that Plaintiff was unable to obtain the "immediate receipt" of said award and was in fact unable to withdraw the award until the trial court ordered same withdrawn on December 13, 1974, based upon Plaintiff's own efforts in determining what portion of the total sum deposited belonged to him in relation to the sums belonging to other Defendants. Plaintiff further alleges in Paragraph V of his Amended Petition that during this period, the Defendant and Petitioner unlawfully, maliciously and wrongfully injected foreign gas into the lands of the Plaintiff resulting in a further trespass.

The Defendant and Petitioner in its Brief in Support of Petition for Writ of Prohibition cites numerous Oklahoma cases which it maintains stand for the proposition that damages for trespass by a condemnor are recoverable only in the condemnation proceeding itself and that the usual remedies in tort are not available. However, without exception, the cases cited by Defendant and Petitioner are, all distinguishable on their facts from the case at bar. The case of *Graham v. City of Duncan, 354 P.2d 458 (Okl. 1960)* involved the loss of a growing crop by a condemnee during the lawful operation by condemnor on the condemned property following payment of the commissioners' award to condemnee, and trespass was not an issue. In *Delhi Gas Pipe Line Corporation v. Swanson, 520 P.2d 670 (Okl. 1974)* trespass was an issue, however, it appears that the condemnor was on the property with the landowner's permission, and that the issue between the parties was the fact that

the condemnor took possession of a strip 210 feet wide rather than a mere 50 feet wide as prayed for in its Petition. In the instant case, Plaintiff is not maintaining that the trespass is a result of any "possession" by the Defendant and Petitioner, but was the result of several unlawful entries. Further, acts of trespass occurring prior to the payment of the commissioners' award apparently was not an issue as it is in the instant action. The cases of *Stedman v. State Highway Commission, 174 Okl. 308, 50 P.2d 657*, and *State of Oklahoma v. Adams, 105 P.2d 416 (Okl. 1940)*, do not involve trespass as an issue and the damages complained of occurred not only after the commissioners award had been paid, but following a trial on the merits. *City Service Gas Company v. Huebner, 197 P.2d 985 (Okl. 1948)* involved alleged trespass occurring during the normal operation of putting in the condemnor's gas pipe line on the condemned property and the disturbance of the property prior to the commissioners' award being paid was not an issue. The case of *Oklahoma City v. Wells, 91 P.2d 1077 (Okl. 1939)* did not involve trespass as an issue, and the case of *Morton v. Okmulgee Producers and Manufacturers Gas Company, 248 P.2d 1028 (Okl. 1952)* involved an issue relating to title over the condemnor's property allegedly wrongfully placed on condemnee's property.

The issues in the instant case involve an alleged intentional trespass by a condemnor (Defendant and Petitioner) resulting in a direct violation of *Article 2, § 24 of the Oklahoma Constitution.*

Proposition II

PETITIONER HAS AN ADEQUATE REMEDY AT LAW AND EXTRAORDINARY WRIT OF PROHIBITION SHOULD NOT ISSUE

Petitioner is seeking to use the superintending con-

trol of this honorable court to prevent Plaintiff from seeking a redress of his damages through his day in court. The District Court of Hughes County, State of Oklahoma, clearly has jurisdiction over the subject matter and parties of this cause. Petitioner's only complaint is that there is, allegedly, another action pending between the parties as to this same subject matter. The use of the extraordinary Writ of Prohibition by this honorable court is only exercised to prevent an inferior judicial tribunal (such as a district court) from exercising jurisdiction which it does not possess, or from exceeding jurisdiction conferred. *Kirk v. Coryell, 419 P.2d 555 (Okl. 1966); Creighton v. District Court, etc., 359 P.2d 581 (Okl. 1961).* Here, the District Court of Hughes County does have jurisdiction and has not in any way exceeded or abused that jurisdiction, and the extraordinary Writ of Prohibition should not lie, as the Petitioner has its adequate legal remedy, if any, through the trial of the case, and appeal if necessary.

CONCLUSION

In conclusion, Plaintiff, Maxwell Darks, maintains that the trespass involved in the case at bar is a complete and distinct subject matter from the subject matter of the condemnation suits pending between these parties and, therefore, Plaintiff respectfully maintains that the Application to Assume Original Jurisdiction and Petition for Writ of Prohibition should be denied, and that the cause be remanded to the trial court for further proceedings.

Respectfully submitted,

/s/ Robert G. Grove
Robert G. Grove

/s/ Carl Michael Smith
Carl Michael Smith

324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorneys for Maxwell Darks

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY
a corporation
Petitioner
vs
FRANK SEAY, the Honorable Judge
of the District Court of the
22nd Judicial District, County
of Hughes, State of Oklahoma
Respondent

Supreme Ct.
No. 48709
District Ct.
No. C-74-251

BRIEF IN SUPPORT OF MOTION TO DENY APPLICATION TO ASSUME ORIGINAL JURISDICTION AND MOTION TO DISMISS PETITION FOR WRIT OF PROHIBITION

STATEMENT OF THE CASE

On November 26, 1974, Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company, filed a trespass action in the District Court of Hughes County, State of Oklahoma, No. C-74-251, as a result of a trespass by the Defendant therein and Petitioner herein, Transok Pipe Line Company. Defendant and Petitioner on the 24th day of January, 1975, filed its Demurrer to Plaintiff's Petition on the grounds that no cause of action was stated in said Petition and that there was another action pending between the parties. Plaintiff thereafter amended its Petition, and the Demurrer as to Plaintiff's Amended Petition was heard by the trial court on the 19th day of June, 1975. The Honorable Frank Seay, Judge of the District Court of Hughes County, overruled Defendant and Petitioner's Demurrer and allowed exceptions to said ruling.

ARGUMENT AND AUTHORITY

Proposition I

RESPONDENT WAS CORRECT IN OVERRULING PETITIONER'S DEMURRER

Petitioner makes no argument that the allegations and averments contained in Plaintiff's Petition are insufficient to state a cause of action. Rather, Petitioner bottoms its argument that the Respondent should have sustained its Demurrer to Plaintiff's Amended Petition based on the fact that there is another action pending between the parties, in which Plaintiff can be afforded full and complete relief. Petitioner cites the condemnation suits in Hughes County District Court, No.'s C-73-93 through C-73-102 (of which Maxwell Darks, individually, is a party in Cases C-73-93, C-73-94, C-73-95, and C-73-100). Plaintiff in this cause, however, is an Oklahoma partnership, and the cases referred to involve one of the partners in his individual capacity only. There is no allegation in either Petitioner's Petition or Brief in Support thereof or Application to Assume Original Jurisdiction that the Plaintiff in this law suit is in any way involved in any other law suit with the Petitioner concerning this or any other subject matter. Petitioner seems to propose that the fact that one of the partners is involved as a party defendant in the condemnation suits somehow gives the trial court jurisdiction over the Plaintiff. There is no question that a partnership is a legal entity, separate and apart from the individual partners who compose it. *C. H. Leavell and Company v. Oklahoma Tax Commission, 450 P. 2d 211 (Okl. 1968); Layman v. Readers Digest Association, 412 P.2d 192 (Okl. 1965).*

12 O. S. § 267 states as follows:

"The Defendant may demur to the Petition only when it appears on its face, either:

> Third. That there is another action pending between the same parties for the same cause."

This Statute requires that the pendency of another action *between the same parties* for the same cause is ground for demur only when *apparent on the face of the Petition. Dean v. Storm, 47 Okl. 358, 148 P. 732 (1915).*

Defendant and Petitioner has in no way taken any property of this Plaintiff in condemnation either by suit or otherwise, and the damage this Plaintiff has suffered, if any, is properly before the District Court of Hughes County in the form of a trespass action seeking the recovery of money damages. The Supreme Court of Oklahoma held in *Benke v. Stepp, 184 P.2d 615, 199 Okl. 119 (1947)* as follows:

> "Injuries resulting from negligence or trespass, in their most comprehensive signification, include an action in form of tort arising from the fault of Defendants. Albert's Ex'x v. Blue, 49 Ky 92; Vol. 42 Word and Phrases, Perm. Ed., page 476."

Proposition II

PETITIONER HAS AN ADEQUATE REMEDY AT LAW AND THE EXTRAORDINARY WRIT OF PROHIBITION SHOULD NOT ISSUE.

Petitioner is attempting to use the superintending control of this honorable court to prevent Plaintiff from seeking a redress of its damages through its day in court. The District Court of Hughes County, Oklahoma, clearly has jurisdiction over the subject matter and parties of this cause. Petitioner's only complaint is that there is, allegedly, another action pending between the parties as to this same subject matter. The use of the extraordinary Writ of Prohibition by this honorable court is only exercised to prevent an inferior judicial tribunal (such as a district court) from exercising jurisdiction

which it does not possess, or from exceeding jurisdiction conferred. *Kirk v. Coryell, 419 P. 2d 555 (Okl. 1966); Creighton v. District Court, etc., 359 P.2d 581 (Okl. 1961).* Here, the District Court of Hughes County does have jurisdiction and has not in any way exceeded or abused that jurisdiction, and the extraordinary Writ of Prohibition should not lie, as the Petitioner has its adequate legal remedy, if any, through the trial of the case, and appeal, if necessary.

Conclusion

In conclusion, Plaintiff Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company, maintains that it is a stranger to the condemnation suits referred to above by the Petitioner and, therefore, those suits could in no way be considered another action pending as to this Plaintiff. Therefore, Plaintiff respectfully maintains that the Application to Assume Original Jurisdiction and Petition for Writ of Prohibition be denied, and that the cause be remanded to the trial court for further proceedings.

Respectfully submitted,

/s/ Robert G. Grove
Robert G. Grove

/s/ Carl Michael Smith
Carl Michael Smith

324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102

Attorneys for Maxwell Darks
and Les Starks, d/b/a Greasy
Creek Cattle Company

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Court No. 48708 District Court No. C-74-250

MEMORANDUM BRIEF

Comes now the Petitioner, pursuant to the invitation of Justice Doolin, apprizing the Court, in the case at bar, as to the significance of the Court's ruling in the case of *Russell vs. McGinn*, 514 P2d 658 (1973). Before analyzing the *Russell* decision, a brief synopsis of the parties' briefs and arguments might be useful.

I.
ARGUMENT OF MAXWELL DARKS

It is the contention of Maxwell Darks (hereinafter referred to as Condemnee) that the Demurrer of the Petitioner in the Hughes County trespass action was a 12 O.S. 1910, Section 267 (3) Demurrer, that is, that another action was pending between the parties for the same cause. The Condemnee further alleges that the Petitioner once "suggested," in argument, that the Condemnee bring a trespass action against the Petitioner. Condemnee also states that OKLA. CONST., art. 2 § 24 was violated because the Petitioner supposedly posted the Commissioners Award in the condemnation suits in such a man-

ner that the Condemnee was denied immediate receipt thereof. Petitioner concludes that the Demurrer was properly overruled by the Respondent, Judge Seay, since the subject matter of the trespass action was different from the subject matter of the Hughes County condemnation suits.

II.
ARGUMENT OF TRANSOK PIPE LINE COMPANY

Said Demurrer of the Petitioner was, in fact, a 12 O.S. 1910, Section 267 (6) Demurrer, that is, that the damaged party had failed to state a cause of action. Petitioner admits that had Transok failed to file the Hughes County condemnation suits, then the Condemnee would have been free to file his own action in inverse condemnation. This is not to say that Petitioner ever suggested that the Condemnee file a trespass action. With regard to the supposed violation of OKLA. CONST. art. 2, § 24, Petitioners sole duty with regard to the posting of the Commissioners Award was to pay the money into Court. 66 O.S. 1972, § 53 and OKLA. CONST. art. 2, §24. Petitioner fulfilled its duty by paying the money into court. If the Court Clerk failed to promptly pay the money out of Court, Condemnee's redress was a Writ of Mandamus directed to the Court Clerk; however, this will not give rise to a trespass action against the Condemnor. Finally, the damages alleged in the trespass action will be decided in the Hughes County condemnation suits. Under Oklahoma law, all damages sustained by any party incident to a condemnor's actions, including damages resulting from negligence or *trespass*, are recoverable *only* in a condemnation proceeding. *Delhi Gas Pipeline Corp. vs. Swanson*, 520 P2d 670 (1974), and

Oklahoma City vs. Wells, 91 P2d 1077 (1939). A Condemnee does not have a cause of action in trespass, as a multiplicity of suits would result, and the threat of a double recovery for the Condemnee would exist — one recovery in the trespass action and another recovery in a condemnation action. See *Cities Service Gas Co. vs. Huebner*, 197 P2d 985 (1948). Condemnation is the Condemnee's *exclusive* and *sole* remedy.

III.
FIRST PROPOSITION
THE *RUSSELL VS. McGINN* DECISION IS RELEVANT TO THE CASE AT BAR

In 1973, the Oklahoma Supreme Court decided the case of *Russell vs. McGinn*, 514 P2d 658 (1973). The Oklahoma Supreme Court held in *Russell* that the Judge of the District Court of Beckham County would be prohibited from proceeding further in a probate action, since the District Court of Grady County was the first to acquire and exercise jurisdiction over the issues involved. The Court stated at 514 P2d, pg. 661, "Under the facts presented, there is no substantial reason why this case should not be disposed of in its *entirety* in Grady County. The District Court of Grady County first acquired and has jurisdiction to settle *all* issues." [Emphasis added.]

The pending Hughes County condemnation suits will be heard by the Honorable Rudolph Hargrave, sitting as a Judge of the District Court of Hughes County. The Hughes County trespass action has been assigned to Judge Frank Seay, Respondent herein. Both the condemnation suits and the trespass case are within the jurisdiction of the Hughes County District Court. The

ruling in the *Russell* case is significant; in that, the Court stated in *Russell* that the District Court first acquiring jurisdiction should dispose of *all* issues, in their *entirety*. The policy underlying the Courts decision was obviously the desire to avoid a multiplicity of suits. In the case at bar, there is no reason why the condemnation suits should not dispose of all damage claims arising out of the condemnor's actions, since the Condemnee has sought affirmative relief by demanding a jury trial in the condemnation suits and Judge Hargrave has general jurisdiction over the determination of the damages issue and the parties.

The *Russell* decision is important, because a conflict may develop between the two Hughes County District Court Judges, as the damaged party is seeking to obtain a recovery in both suits for the same acts of the Condemnor allegedly resulting in the same damages. The issue of damages incident to the Condemnor's actions must be decided in one action; otherwise, the objective of the condemnation statutes, the conclusive determination of the rights and obligations of all parties, would be frustrated.

IV.
CONCLUSION

Pursuant to the argument and authority cited by the Petitioner, a Writ of Prohibition should be issued prohibiting Judge Seay from continuing with the Hughes County trespass action and, thereby, exercising unauthorized judicial power.

THEREFORE, pursuant to the law and the facts of the case at bar, Petitioner respectfully requests that this

Honorable Court issue its Writ of Prohibition as prayed for.

Respectfully submitted,

TRANSOK PIPE LINE COMPANY

BY /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

P. O. Box 201
Tulsa, OK 74102
PH: 583-3611

CERTIFICATE OF SERVICE

I, Kevin M. Abel, hereby certify that I sent a true and correct copy of the above and foregoing Memorandum brief to each of the parties involved herein, on this 8th day of August, 1975.

/s/ Kevin M. Abel
Kevin M. Abel

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Court No. 48709 District Court No. C-74-251

MEMORANDUM BRIEF

Comes now the Petitioner, pursuant to the invitation of Justice Doolin, apprizing the Court, in the case at bar, as to the significance of the Court's ruling in the case of *Russell v. McGinn*, 514 P2d 658 (1973). Before analyzing the *Russell* decision, a brief synopsis of the parties' briefs and arguments might be useful.

I.

ARGUMENT OF MAXWELL DARKS
AND LES STARKS d/b/a
GREASY CREEK CATTLE COMPANY

It is the contention of Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company (hereinafter referred to as Condemnee) that the Demurrer of the Petitioner in the Hughes County trespass action was a 12 O.S. 1910, Section 267 (3) Demurrer, that is, that another action was pending between the parties for the same cause. The Condemnee argues that it is a partnership, the Greasy Creek Cattle Company, which raises Santa

Gertrudis cattle. The damaged party, the alleged partnership, argues that a "condemnee" can only be defined as a party joined in a condemnation suit. The alleged partnership concludes that the Demurrer was properly overruled by the Respondent, Judge Seay, since the partnership was not involved in and is a stranger to the pending Hughes County condemnation suits.

II.
ARGUMENT OF TRANSOK PIPE LINE COMPANY

Said Demurrer of the Petitioner was, in fact, a 12 O.S. 1910, Section 267 (6) Demurrer, that is, that the damaged party had failed to state a cause of action. Under Oklahoma law, all damages sustained by any party incident to a condemnor's actions, including damages resulting from negligence or trespass, are recoverable only in a condemnation proceeding. A "condemnee" is any property owner damaged by a condemnor's actions; the term "property" as used in OKLA. CONST. art 2, § 24, includes not only real estate held in fee, but also personal property. *Graham vs. City of Duncan*, 354 P2d 458 (1960). Condemnation is a condemnee's *exclusive* and *sole* remedy. *Delhi Gas Pipeline Corp. vs. Swanson*, 520 P2d 670 (1974), and *Oklahoma City vs. Wells*, 91 P2d 1077 (1930). A damaged party does not have a cause of action in trespass, as a multiplicity of suits would result, and the threat of a double recovery for the damaged party would exist — one recovery in the trespass action and another recovery in the condemnation action. See *Cities Service Gas Co. vs. Huebner*, 197 P2d 985 (1948). Petitioner challenges condemnees' contention that the cutting of fences and the entry onto and the taking of possession of Darks real estate constitutes a trespass to animals grazing thereon.

Assuming, arguendo, the existence of the partnership, the partnership is a tenant, and the tenants exclusive and sole remedy for its damages incident to the Condemnor's actions is in the pending condemnation jury trials. *Graham vs. City of Duncan, supra.* If a tenant is to obtain a recovery for his damages, he must intervene in a condemnation action, or if no condemnation action has been filed, his remedy is inverse condemnation.

III.
FIRST PROPOSITION
THE *RUSSELL VS. McGINN* DECISION IS RELEVANT TO THE CASE AT BAR

In 1973, the Oklahoma Supreme Court decided the case of *Russell vs. McGinn*, 514 P2d 658 (1973). The Oklahoma Supreme Court held in *Russell* that the Judge of the District Court of Beckham County would be prohibited from proceeding further in a probate action, since the District Court of Grady County was the first to acquire and exercise jurisdiction over the issues involved. The Court stated at 514 P2d, pg. 661, "Under the facts presented, there is no substantial reason why this case should not be disposed of in its *entirety* in Grady County. The District Court of Grady County first acquired and has jurisdiction to settle *all* issues." [Emphasis added.]

The pending Hughes County condemnation suits will be heard by the Honorable Rudolph Hargrave, sitting as judge of the District Court of Hughes County. The Hughes County trespass action has been assigned to Judge Frank Seay, Respondent herein. Both the condemnation suits and the trespass case are within the jurisdiction of the Hughes County District Court. The ruling in the *Russell* case is significant; in that, the Court stated in *Russell* that the District Court first acquiring

jurisdiction should dispose of *all* issues, in their *entirety*. The policy underlying the Courts decision was obviously the desire to avoid a multiplicity of suits. In the case at bar, there is no reason why the condemnation suits should not dispose of all damage claims arising out of the condemnor's actions, since the partner Maxwell Darks has sought affirmative relief by demanding a jury trial (and by raising the cattle damage issue) in the condemnation suits and Judge Hargrave has general jurisdiction over the determination of the damages issue and the parties.

The Russell decision is important, because a conflict may develop between the two Hughes County District Court Judges, as the damaged party is seeking to obtain a recovery in both suits for the same acts of the Condemnor allegedly resulting in the same damages. The issue of damages incident to the Condemnor's actions must be decided in one action; otherwise, the objective of the condemnation statutes, the conclusive determination of the rights and obligations of all parties, would be frustrated.

IV.
CONCLUSION

Pursuant to the argument and authority cited by the Petitioner, a Writ of Prohibition should be issued prohibiting Judge Seay from continuing with the Hughes County trespass action and, thereby, exercising unauthorized judicial power.

THEREFORE, pursuant to the law and the facts of the case at bar, Petitioner respectfully requests that this Honorable Court issue its Writ of Prohibition as prayed for.

Respectfully submitted,

TRANSOK PIPE LINE COMPANY

By: /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin M. Abel
Attorneys for Petitioner

P. O. Box 201
Tulsa, OK 74102
PH: 583-3611

CERTIFICATE OF SERVICE

I, Kevin M. Able, hereby certify that I sent a true and correct copy of the above and foregoing Memorandum Brief to each of the parties involved herein, on this 9th day of August, 1975.

/s Kevin M. Abel
Kevin M. Abel

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPELINE COMPANY, a corporation,
Petitioner
-vs-
FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma
Respondent

Supreme Ct. No. 48708
District Ct. No. C-74-250

REPLY TO MEMORANDUM BRIEF

COMES NOW Maxwell Darks, on behalf of himself and the respondent, and replies to the memorandum brief of the petitioner as follows:

I

Maxwell Darks, would invite this court's attention to the language of Petitioner's Demurrer before the trial court and the transcript of argument before that court and the brief and arguments of Petitioner before this court, all in substance, arguing that the respondent should be prohibited from jurisdiction over this matter due to *another action pending*.

II

The amended petition of Maxwell Darks clearly alleges that a trespass took place well prior to the date the condemnor deposited funds for the condemnee as awarded by the report of commissioners (June 25, 1973). Article II, Section 24 of the Oklahoma Constitution was

clearly violated by the petitioner with particular regard to the following language:

> "Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights divested."

Again, none of the cases cited by Petitioner with regard to the question of a condemnee's remedy for damages caused by trespass of a condemnor occurred prior to the payment of the Commissioner's award and none involved a construction of the above quoted constitutional language. Petitioner's suggestion that Plaintiff's action for trespass be joined in the condemnation suits give rise to at least two additional problems.

(1) Will Plaintiff be required to assert his damages in all of the condemnation suits in which he is a party (Hughes County District Court Nos. C-73-93, C-73-94, C-73-95 and C-73-100) and if not all which one?

(2) Will he be allowed to recover punitive damages as provided by 23 O.S., Section 9, as he has alleged a wrongful and malicious entry?

III

The case of *Russell -vs- McGinn 514 p.2d 658, Okl. 1973*, is not applicable to the present action. In *Russell* this Honorable Court was confronted with a question of jurisdiction involving two separate District Courts within the State of Oklahoma. Here, both the trespass action and the condemnation actions are pending in the District Court of Hughes County.

WHEREFORE, premises considered, Plaintiff, Maxwell Darks, respectfully prays that the Petition for Writ of Prohibition be denied by this Honorable Court and

that this cause be remanded to the District Court of Hughes County for trial on its merits.

Respectfully submitted,

ROBERT G. GROVE

By /s/ Carl Michael Smith
Carl Michael Smith
Suite 300
324 North Robinson
Oklahoma City, Oklahoma

Attorneys for Plaintiff
Maxwell Darks

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Reply to Memorandum Brief to Charles B. Crane, Attorney at Law, P. O. Box 201, Tulsa, Oklahoma, 73102 and The Honorable Frank Seay, District Judge, Hughes County Courthouse, Holdenville, Oklahoma 74848, on this 11th day of August, 1975.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma Respondent	Supreme Ct. #48,709 District Ct. #C-74-251

REPLY TO MEMORANDUM BRIEF

COME NOW Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company, on behalf of itself and the respondent, and replies to the memorandum brief of the petitioner as follows:

I

Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company would invite this court's attention to the language of petitioner's Demurrer before the trial court and the transcript of argument before that court and the brief and arguments of petitioner before this court, all, in substance, arguing that the respondent should be prohibited from jurisdiction over this matter due to *another action pending.*

II

This trespass action being maintained by Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company is not seeking "double recovery" as asserted by petitioner. This is the only action ever instituted concerning

these two parties, and the amended petition clearly shows only a single recovery (money damages) is being sought. This plaintiff is a tenant on real property only a *portion* of which is being condemned. Condemnation has never been sought by petitioner against any real or personal property owned by the cattle partnership. The case of *Graham v. City of Duncan, 354 P.2d 458 (Okla. 1960)* involved a tenant who was a *party defendant* in the condemnation action and held, quite properly, that his failure to put on evidence of his damages during the condemnation trial constituted res judicata. Petitioner asserts that the cattle partnership "must intervene" in the condemnation suits it has filed in Hughes County without citing any authority requiring such intervention and offering no suggestion as to (1) which, if any, or all, of the 10 suits (Hughes County District Court Case Nos. C-73-93 through C-73-102) it should intervene, (2) its position as to the award of punitive damages therein, if the facts show the cattle partnership to be entitled to same, or (3) how the issues would be joined in a condemnation action which allows only a petition, exceptions to commissioner's report and demand for jury trial to be filed. *Board of County Commissioners of Creek County v. Casteel, 522 P.2d 608 (Okla., 1974).* Inverse condemnation would not be the remedy as petitioner has neither brought condemnation action nor taken any part of the cattle partnership's property for public use. *Chandler v. Oklahoma Turnpike Authority, 271 P.2d 374 (Okla., 1954); Elk City v. Rice, 286 P.2d 275 (Okla. 1955);* See also *66 O.S. § 57.* Both *Chandler* and *Elk City* indicate that the common law tort action presently before the court is the proper remedy.

III

The case of *Russell vs. McGinn 514 P.2d 658, Okla. 1973,* is not applicable to the present action. In *Russell*

this Honorable Court was confronted with a question of jurisdiction involving two separate District Courts within the State of Oklahoma. Here, both the trespass action and the condemnation actions are pending in the District Court of Hughes County.

WHEREFORE, premises considered, Plaintiff, Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company respectfully prays that the Petition for Writ of Prohibition be denied by this Honorable Court and that this cause be remanded to the District Court of Hughes County for trial on its merits.

Respectfully Submitted,

ROBERT G. GROVE

by /s/ Carl Michael Smith
CARL MICHAEL SMITH
324 N. Robinson, Suite 300
Oklahoma City, Oklahoma 73102

Attorneys for Plaintiff
Maxwell Darks and Les Starks
d/b/a Greasy Creek Cattle
Cattle Company

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Reply to Memorandum Brief to Charles B. Crane, Attorney at Law, P.O. Box 201, Tulsa, Oklahoma, 73102 and the Honorable Frank Seay, District Judge, Hughes County, Courthouse, Holdenville, Oklahoma 74848, on this 11th day of August, 1975.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Transok Pipe Line Company,
a corporation,
Petitioner
vs.
Frank Seay, the Honorable Judge
of the District Court of the
22nd Judicial District, County
of Hughes, State of Oklahoma,
Respondent.

No.'s 48,708
& 48,709

ORDER

This matter comes on for hearing upon petitioners' application and petition for Writ of Prohibition against the Hon. Frank Seay, Respondent, seeking to prohibit said District Judge from further proceedings in causes No. C-74-250 & 251 pending in Hughes County, Oklahoma.

It further appearing to this Court that such last mentioned causes of action were filed by the owner of lands sought to be condemned and his alleged partner against the petitioner herein and that they sound in tort (trespass) and seek damages against the real premises and personalty located thereon.

This Court being fully advised in the premises, after hearing argument and for good cause shown, finds that petitioner is entitled to Writs of Prohibition against the Respondent, by virtue of our holdings in Delhi Gas Pipe Line Co. vs. Swanson 520 P.2d 670 (1974); Oklahoma City vs. Wells 185 Okl 369, 91 P.2d 1077 (1939); Cities Service Gas Co. vs. Huebner 200 Okl 521, 197 P.2d 985 (1948) and Graham vs. The City of Duncan 354 P.2d 458 (1960).

WRITS GRANTED.

DONE IN CONFERENCE THIS 8th day of September, 1975, under the superintending control granted this Court, Art. VII § 4 of the Oklahoma Constitution.

/s/ Ben T. Williams
Chief Justice

No. 48,708
No. 48,709

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY
Petitioner

-vs-

FRANK SEAY, THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE 22ND JUDICIAL DISTRICT, COUNTY OF HUGHES, STATE OF OKLAHOMA
Respondent

Petition for Rehearing

ROBERT G. GROVE
CARL MICHAEL SMITH
Suite 300
324 North Robinson
Oklahoma City, Oklahoma

Attorneys for Respondent and Maxwell Darks and Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company

September, 1975

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Petitioner
-vs-
FRANK SEAY, THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE 22nd JUDIICAL DISTRICT COUNTY OF HUGHES, STATE OF OKLAHOMA
Respondent

No. 48,708
No. 48,709

PETITION FOR REHEARING

COMES NOW Maxwell Darks, and Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company on behalf of themselves and the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent herein and respectfully represents to the Court that on the 8th day of September, 1975, an order was entered by this Honorable Court in said cause in which the Respondent herein was prohibited from further proceedings in the causes No. C-74-250 and C-74-251 pending in Hughes County, Oklahoma.

I

That the decision overlooked certain questions decisive of the case, and duly submitted by counsel, to-wit:

(1) That the causes alleged that a trespass occurred giving rise to both causes of action prior to the condemnation suits being filed by the Petitioner and thus in direct violation of the *Oklahoma Constitution, Article 2, Section 24,* which provides that: "Until the compensation shall be paid to the owner or into court, for the owner

the property shall not be disturbed or the proprietary rights of the owner divested."

That the Plaintiffs below in Case No. C-74-251 are not parties to any condemnation suit; that they comprise a partnership which is a legal and separate entity apart from any individual partners who compose it. *C. H. Leavell and Company -vs- Oklahoma Tax Commission, 450 P.2d 211 (Okl., 1968); Layman -vs- Reader's Diegest Association, 412 P.2d 191 (Okl., 1965)*

That although this Honorable Court cited its prior decisions indicating that damages for trespass could be recovered by a condemnee in a pending condemnation action, this Honorable Court failed in its order to give any direction to these parties as to which of the many condemnation suits being prosecuted against the Plaintiffs below such damages should be included, and, as to the Plaintiffs below in Case No. C-74-251, as to which action they should join to recover their damages.

(4) This Honorable Court also failed to express its position as to the award of punitive damages upon the trespass, if in fact, the facts show that the Plaintiffs below be entitled to same.

II

This Honorable Court overlooked a decision which is believed to be a controlling decision as to the availability or nonavailability of a condemnation suit or an inverse condemnation suit as a remedy for tort committed upon a landowner whose property had not been taken or sought to be taken by a condemnation action for public use. *Elk City v. Rice, 286 P2d 275 (Okl, 1955).* Respondent respectfully maintains that this decision would control as concerns the cattle partnership in Case No. C-74-251.

III

That oral arguments be allowed on this Petition before this court.

WHEREFORE, Maxwell Darks and Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company on behalf of themselves and the Respondent herein, respectfully pray for a rehearing of said cause; that this cause be remanded to the District Court of Hughes County for a trial on its merits.

Respectfully submitted,

/s/ Carl Michael Smith
ROBERT G. GROVE and
CARL MICHAEL SMITH
Attorneys for Respondent and
Maxwell Darks and Maxwell Darks
and Les Starks d/b/a Greasy
Creek Cattle Company

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Petition for Rehearing to Charles B. Crane, Attorney at Law, P.O. Box 201, Tulsa, Oklahoma 74102, and the Honorable Frank Seay, District Judge, Hughes County Courthouse, Holdenville, Oklahoma, on this 16th day of September, 1975.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
Petitioner,
vs.
FRANK SEAY, JUDGE OF THE DISTRICT COURT OF HUGHES COUNTY, OKLAHOMA,
Respondent.

No. 48,708 and
No. 48,709

ORDER TO FILE RESPONSE

Petitioner herein, Transok Pipe Line Company, is hereby Ordered to file a Response to the Petition for Rehearing filed herein on or before the 7th of November, 1975.

Dated this 23rd day of October, 1975.

/s/ Ben T. Williams
Chief Justice

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, a corporation, Petitioner, vs. FRANK SEAY, the Honorable Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, Respondent.	Supreme Court No. 48708 and No. 48709

PETITIONER'S RESPONSE TO
PETITION FOR REHEARING

COMES NOW the Petitioner, pursuant to the Court's ORDER TO FILE RESPONSE, issued on the 23rd day of October, 1975, requiring the Petitioner to file its response to the Respondents' Petition for Rehearing.

STATEMENT OF FACTS

On July 18, 1975, Petitioner filed the above-entitled and numbered original proceedings seeking writs of prohibition against the Honorable Frank Seay, Judge of the District Court of the 22nd Judicial District, County of Hughes, State of Oklahoma, for the reason and upon the grounds that the Respondent's overruling of Petitioner's Demurrer in the following cases was in error:

Maxwell Darks vs. Transok Pipe Line Company, C-74-250, and

Maxwell Darks and Les Starks, d/b/a Greasy Creek Cattle Company, vs. Transok Pipe Line Company, C-74-251.

On July 21, 1975, this Court issued its stay order in the aforementioned Hughes County actions. On July 29, 1975, Carl Michael Smith filed a motion and brief seeking the dismissal of these writ of prohibition actions on behalf of the Plaintiffs in the aforementioned Hughes County trespass actions and the Honorable Frank Seay. On August 5, 1975, a hearing was held by his Honor Justice Doolin, and arguments by the Petitioner and by the Respondent were entertained by the Court. All issues were raised, all issues were discussed, and all issues were considered by the Court at that time. Justice Doolin invited the Petitioner and Respondent to apprise the Court as to the significance of the Court's ruling in the case of *Russell vs. McGinn*, 514 P.2d 658 (1973), and on August 8, 1975, the Petitioner filed its Memorandum Brief reviewing the *Russell* case, and Mr. Carl Michael Smith filed his Reply to said Memorandum Brief on August 11, 1975. On September 8, 1975, the Supreme Court, in conference, under its superintending control and authority, granted a writ of prohibition in both cases, 48708 and 48709. On september 16, 1975, Mr. Carl Michael Smith filed his Petition for Rehearing, and on the 23rd day of October, 1975, this Court ordered the Petitioner to file its response thereto on or before November 7, 1975.

PETITIONER'S RESPONSE

Petitioner asserts that said Petition for Rehearing is inappropriate, that the prayer for a rehearing should be denied, and that the Order of the Court granting the writs of prohibition should remain in full force and effect.

PROPOSITION I

THE COURT DID NOT OVERLOOK DECISIVE QUESTIONS.

It is alleged in the Petition for Rehearing that the

Supreme Court overlooked certain questions decisive of the case which were duly submitted by counsel, to-wit:

(1) that a trespass action is an appropriate remedy for a condemnor's taking prior to the filing of a condemnation suit, pursuant to the provisions of Article II, §24 of the Oklahoma Constitution;

(2) that the alleged partnership, the Greasy Creek Cattle Company, was not a party to any condemnation suit;

(3) the Court in its Order of September 8, 1975, failed to direct the Plaintiffs below to any specific condemnation action now proceeding in which they might appropriately recover their damages; and

(4) the Court " . . . failed to express its position as to the award of punitive damages . . . "

Petitioner will respond to each of the above four points in the order in which they are raised.

(1) Article II, §24, of the Oklahoma Constitution provides in pertinent part, "Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the property rights of the owner divested." In other words, the condemnor must first pay the just compensation, and only then may he enter upon the land and take so much of the real estate as may be necessary for the condemnor's purposes. Assuming arguendo that the condemnee's land has been taken first and compensation has been paid later in violation of Article II, §24, what is the comdemnee's remedy? Respondents contend that a violation of this constitutional provision gives rise to a cause of action in trespass. However, 66 O.S. 1910, §51, states that a condemnee's land *may be taken*, held, and appropriated for the condemnor's purposes, and 66 O.S. 1971, §53, out-

lines the procedures and the filing of a condemnation suit by the condemnor *or the condemnee*. Furthermore, the cases relied on by the Petitioner and cited by the Court in its Order of September 8, 1975, hold that inverse condemnation is the landowner's sole remedy. In one of those cases, *Delhi Gas Pipeline Corp. vs. Swanson*, 520 P.2d 670 (1974), there was a taking first and just compensation was paid later in a condemnation suit. Respondents can receive just compensation in the pending Hughes County condemnation suits. There is no cause of action in trespass.

(2) Respondents contend that the Greasy Creek Cattle Company is not a party to any condemnation suit at this time. Petitioner doubts the very existence of the alleged partnership.[1] but assuming arguendo that it does exist, its sole remedy for the condemnor's actions is in the pending Hughes County condemnation suits.

In the case of *Graham vs. the City of Duncan*, 354 P.2d 458 (1960), the damaged party was a tenant, which is the very position occupied by the alleged partnership. A tenant, damaged by a condemnor's actions, must raise his damages in a pending condemnation suit. The Demurrers filed in the aforementioned trespass actions were 12 O.S. 1910, §267(6) demurrers, that is, the damaged party had failed to state a cause of action. Said Demurrers were not based on 12 O.S. 1910, §267(3), that is,

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[1]The filings of Maxwell Darks in the Hughes County condemnation suits are evidence of the partnership's nonexistence and are attached hereto and made a part hereof, marked "Exhibit A". In the attached pleadings Maxwell Darks is shown to be the owner of the land and the owner of the cattle, and that Mr. Starks is merely the caretaker of the cattle on the Darks' property. It should be noted that the Greasy Creek Cattle Company is never mentioned in these pleadings. The pertinent portions of said pleadings are emphasized for the convenience of the Court.

that there was another action pending between the same parties. The Demurrers were filed on the basis that there simply was no cause of action in trespass, and that a damaged party must seek its recovery in a condemnation proceeding. It is true that the alleged partnership is not a party to any of the condemnation suits, but Maxwell Darks, an alleged partner, had notice of the suits. Having actual notice of the condemnation suits, the alleged partnership must intervene and seek its recovery in said suits.

(3) Respondent contends that the Court, in its Order of September 8, 1975, failed to direct the Respondents to any specific condemnation action in which they might appropriately recover their damages. The Hughes County condemnation suits, now proceeding, can fully adjudicate the condemnee's damages. Maxwell Darks is already a party to said suits, and the alleged partnership must intervene in those suits if it wishes to pursue a recovery. In its Petition, Transok prayed for a writ of prohibition directed to the Judge of the District Court of Hughes County. In its Order of September 8, 1975, the Court ruled on the sole issue of granting or denying the writs. Having granted the writs, Mr. Darks and the alleged partnership can recover their damages in the pending Hughes County actions. The Supreme Court of the State of Oklahoma is not responsible for directing the Respondents in their efforts to recover their damages in said actions.

(4) Respondent contends that the Court failed to express its position as to the prayer for punitive damages in the Hughes County trespass actions. In the case of *Oklahoma City vs. Wells*, 91 P.2d 1077 (1939), the Oklahoma Supreme Court stated, "When the act of the public authorities in entering upon and occupying private

land which they have taken by eminent domain . . . is expressly authorized by a statute . . . , such an act is not in any sense wrongful or *tortious* and cannot be made the basis of an action of trespass or any other action sounding in tort." Exemplary damages are appropriate only in *ex delicto* actions. 23 O.S. 1910, §9. Since a condemnor's actions can never be in any sense tortious, exemplary damages would never lie for a condemnor's acts. Punitive damages are not appropriate in condemnation suits, and a trespass action, with a prayer for punitive damages, fails to state a cause of action in a condemnation setting.

PROPOSITION II

ELK CITY vs. RICE IS NOT A CONTROLLING DECISION

It is alleged in the Petition for Rehearing that the case of *Elk City vs. Rice*, 286 P.2d 275 (1955), is a controlling decision as concerns the alleged cattle partnership in the Hughes County trespass action, No. C-74-251. The *Rice* decision has no bearing whatsoever on the case at bar. In *Rice*, the municipality, Elk City, constructed a water pipeline in 1937 and obtained a pipeline right-of-way easement from the Plaintiff Rice before construction was ever commenced. Six years later in 1943, Elk City built a dike to repair the pipeline, but negligently failed to remove it after the pipeline was repaired. The presence of the dike caused the erosion of Plaintiff's land in 1948, eleven years after the construction of the pipeline. Rice brought suit in inverse condemnation *and* negligence, and was awarded damages under the negligence theory only. The City appealed, but the Supreme Court affirmed the judgment of the trial court. *Rice* did not involve damages incident to an eminent domain taking. In the words of the Court, "Here there has been no

taking or occupancy, without compensation, of any part of the Plaintiff's land for a public use." *Rice* at 277. There was no taking in the Rice case; there was a negligent failure to remove a dike. In the case at bar, the acts by the Petitioner complained of by the Respondents were incident to its eminent domain taking, and the cases relied on by the Petitioner hold that the Petitioner's acts, even negligent acts, that result in damages to a landowner or his tenants, can be recouped only in condemnation or inverse condemnation actions. *Elk City vs. Rice* is not controlling in any way whatosever.

PROPOSITION III

ORAL ARGUMENTS SHOULD NOT BE ALLOWED ON THE PETITION FOR REHEARING.

Respondent's final contention is that oral argument should be allowed on the Petition for Rehearing. On August 5, 1975, the Court heard argument by both parties, and the Respondent discussed every point advanced in the Petition for Rehearing. Additional oral argument by either side would not provide the Court with any new or helpful information in deciding this matter, and Respondent's prayer for oral argument is an imposition upon the Court's time. Respondent's prayer for oral argument on the Petition for Rehearing should be denied.

CONCLUSION

Respondent has totally failed to submit to the Court any argument justifying a rehearing, and Petitioner prays that the Petition for Rehearing should be denied and

that the Order of the Court granting the writs of prohibition should remain in full force and effect.

Respectfully submitted,

TRANSOK PIPE LINE COMPANY

By /s/ Robert L. Lawrence
Robert L. Lawrence

/s/ Charles B. Crane
Charles B. Crane

/s/ Kevin M. Abel
Kevin Abel
Attorneys for petitioner

P.O. Box 201
2932 First National Tower
Tulsa, Oklahoma 74102
Telephone: (918) 583-3611

CERTIFICATE OF SERVICE

I, Kevin M. Abel, hereby certify that on the 3rd day or November, 1975, I mailed a true and correct copy of the above and foregoing Response to Petition for Rehearing to:

Carl Michael Smith, Esquire
324 North Robinson, Suite 300
Oklahoma City, Oklahoma 73102
Attorney for Maxwell Darks and
Maxwell Darks and Les Starks, d/b/a
Greasy Creek Cattle Company, and

The Honorable Frank Seay
Judge of the District Court of
Hughes County
Hughes County Court House
Holdenville, Oklahoma 74848

/s/ Kevin M. Abel
Kevin M. Abel

IN THE DISTRICT COURT IN AND
FOR HUGHES COUNTY, OKLAHOMA

TRANSOK PIPELINE COMPANY, Plaintiff	No. C73-93
-vs-	No. C73-94
MAXWELL DARKS Defendant	No. C73-95

APPLICATION FOR TEMPORARY RESTRAINING ORDER TO ENJOIN TRESPASS AND APPLICATION FOR TEMPORARY INJUNCTION

1. That the defendant, Maxwell Darks, is the owner of the land described in this action, his Fee Ownership being that of all ownership to the surface and everything permanently situated beneath or above it as described in Title 60, Oklahoma Statutes, Section 66, but less and except all oil and gas mineral rights previously conveyed and severed from his Fee Ownership and the ownership of oil and gas leasehold estates originating therefrom.

2. That prior to April 5, 1973, Transok Pipeline Company, through it's agents and servants made entry upon this land for the express purpose of examining, preparing, and doing those things necessary to complete a proposed gas storage project so that they could thereafter maintain and operate such undergroumd natural gas storage facilities.

3. That the defendant was advised on April 5, 1973, that the fences on his property had been cut, that gates had been left open when they were shut, that bulldozers and work crews were on his land, along with work-over rigs, owned by parties unknown.

4. That on April 7, 1973, the defendant encountered members of a work crew, one of which admitted that he

"Exhibit A"

had been following instructions of Transok Pipeline Company and had participated in the work described in "3" above. That the other worker refused to say who he was with or what he was doing. That the defendant advised them to stay off of his property until they had authority under law to make entry to his property.

5. That on April 10, 1973 Mr. Reddick, an employee of Public Service Company of Oklahoma and Transok Pipeline Company, *called Mr. Les Starks, the party responsible for the care of the cattle on the Darks' property,* and advised him that Transok Pipeline Company was coming back in on the Darks' property.

6. That the defendant then called Mr. Charles B. Crane, attorney for Transok Pipeline Company to discuss the matter. Mr. Crane advised the defendant that there must be some misunderstanding and that Mr. Darks could be assured that Transok Pipeline Company would not make further entry until this matter was discussed with him. Mr. Crane further gave his word that the matter would be handled in this manner.

7. That on April 17, 1973 the defendant was advised that Transok Pipeline Company was back on his property and had again left gates down and allowed the cattle to again be lost south of the ranch.

8. That on May 24, 1973 the defendant again called Mr. Charles B. Crane, attorney for Transok Pipeline Company regarding this matter and he now denied that any entry had been made on the Darks' land other than the possible trespass of a surveying crew.

9. On May 31, 1973 the defendant took this matter up with the Honorable Bob Howell, after he had disqualified in this case but remained in the case to appoint the appraisers and after the Judge advised Mr. Mike

Smith, one of the attorneys for the defendant, that there would be no judge over to hear the motions filed in the case by Mr. Smith, the defendant then stated to the Judge that he needed some one to issue a temporary restraining order in this matter as the Transok Pipeline Company was violating the provisions of Article 2, Section 24 at which time he was advised that he had a remedy at law and the matter would not be heard.

10. That on June 7, 1973 when Honorable Rudolph Hargrave heard the motions filed in this case, Mr. Mike Smith made a request for a temporary injunction and was advised by the court that he had a remedy at law and that this matter would not be heard in this case.

11. That Article 2, Section 24 of the Constitution of Oklahoma specifically states that "Until compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested."

12. That by reason of the fact that the statutes under which this condemnation are in violation of the due process clause of the United States Constitution and the Oklahoma Constitution; that a temporary injunction should be issued herein preventing the entry on to the property of the defendant until such time as the constitutional question of due process is resolved after the defendant has exhausted his legal rights herein.

13. That the *defendant* has suffered special and peculiar injury from the unlawful trespass upon his land for the following reasons, to-wit:

(a) That by reason of gates being left open the bulls on his commercial cattle gained entry to 44 Santa Gertrudis heifers that were eligible for registry in the Santa Gertrudis Association. That a registered Santa Gertrudis bull with Rock-

fellow Ranch breeding had been purchased to use in the breeding program for the registered heifers but had not been placed with the heifers because of their young age and that as a result of the gates being left down and the fences being cut in the trespass on the defendant's land he has suffered irreparable injury in the breeding program planned for the cattle resulting in great damage to the value of the herd.

(b) That by reason of the fact that the fences were cut and the gates left open the cattle left defendant's property on his south side into a primitive area where they remained several days before they could be located and returned to the property of defendant. That said area contains cattle and bulls of various blood lines and this fact further complicates the breeding program and adds additional damage to the value of the herd.

14. That such disregard for the rights of ownership of the defendant herein has further reduced the market value in and to his property by reason of the fact that no one wants to be subject to this form of rude, overbearing trespassing on the part of an operator.

15. *That defendant has suffered in excess of $10,000 damage to his cattle herd* and other special damage to the land not yet assessable but for which defendant is entitled to actual and punitive damages by reason of this wrongful and intentional conduct on said land reflecting reckless disregard for the rights of defendant in his land.

16. That said nuisance is continuous and constantly recurring, and that it will work irreparable injury to the defendant and his land, and will result in interminable litigation, unless the defendant has relief in law and in

equity and this court has jurisdiction in this matter under the provisions of Article 2, Section 24, and other applicable law to hear and determine this matter.

17. That a duplicate original application for this temporary restraining order has been mailed to the Honorable Rudolph Hargrave, District Judge, Seminole, Oklahoma, along with a proposed order for his signature.

18. That a copy of the application has been mailed to Mr. Charles B. Crane, Attorney, P. O. Box 201, Tulsa, Oklahoma, 74102.

19. That the original verified application has been mailed to Mrs. Lois Merchant, County Clerk, Holdenville, Oklahoma, this date.

By reason of the foregoing, the defendant ask the court to grant a order temporary restraining any further entry onto the land of the defendant herein and further ask that at said hearing a temporary injunction be granted injoining any further entry onto the land of the defendant until the rights of plaintiff and defendant have been adjudicated finally in this matter as to allow entry at this time onto the land of the defendant by the plaintiff could result in irreparable damages to his land and limit his rights to said land prior to a final adjudication in this matter.

/s/ Maxwell Darks

STATE OF OKLAHOMA
COUNTY OF OKLAHOMA

Subscribed and sworn before me, the undersigned Notary Public, on the 9th day of June, 1973.

/s/ Sammy C. Roberts

My commission expires March 10, 1974

IN THE DISTRICT COURT
OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Plaintiff
-vs-
HUBERT DOUGLAS, JR., et al
Defendant

No. C-73-93

MOTION TO DISMISS WITH PREJUDICE
AND REQUEST TO ISSUE
PERMANENT INJUNCTION

COMES NOW the Defendants, Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Williams, Robert M. Moran, Barbara M. Moran, Barbara M. Jernigan, and John E. Moran Trust and respectfully show the court as follows:

I

That the Plaintiff, Transok Pipeline Company, has wholly failed, neglected and refused to comply with its constitutional and statutory duties under the laws of the State of Oklahoma in the prosecution of the above styled action in the following particulars, to-wit:

1. That several months prior to the report of the commissioners in this cause, Plaintiff entered upon the property of Defendant Maxwell Darks and disturbed his possession thereof by rearranging the terrain, cutting cattle fences, *allowing the release of the Defendant Maxwell Darks cattle* and disturbing the proprietary rights of this Defendant by laying injection pipeline and preparing injection wells; all causing irrepairable damage to this Defendant without authority of law.

2. That although Plaintiff is required under the law of the State of Oklahoma to submit to the commissioners information as to the quantity and boundaries of the property being condemned, they wholly failed to do so.

3. That although the commissioners had no knowledge as to the quantity of the property being condemned, they filed their report with the clerk of this court, as to an award of damages for this and other Defendants. That although the said report of the commissioners was filed herein on June 25, 1973, the Plaintiff has wholly failed to deposit the money assessed as damages to those Defendants in such a manner as to allow these Defendants to demand and obtain "immediate receipt" of same. That the damages awarded these Defendants were commingled with the damages of other defendants herein so as to render it impossible for the clerk to pay any individual defendant as shown by Defendant's Exhibits "A" and "B" attached hereto and made a part hereof. That this delivery by Plaintiff to the clerk was calculated to technically comply with the law of the State of Oklahoma but thereby deprive this and other defendants of the availability of these funds.

4. That under the constitution and statutes of the State of Oklahoma, payment of money to these Defendants is a MANDATORY CONDITION PRECEDENT to Plaintiff's right of entry and possession upon Defendants' property. Plaintiff's failure to take the necessary affirmative action as required by law, is, in effect, an abandonment of this lawsuit and places Plaintiff in the position of a mere "naked trespasser."

5. That the form of notice of the report of the commissioner has not been shown to be one approved by the Supreme Court of Oklahoma and having been prepared

by the court administrator as required under Oklahoma law.

II

That one of the commissioners appointed by the court in this cause, to-wit: Binas Hostettler, is an attorney a member of the Oklahoma Bar Association, and is, therefore, not an eligible freeholder selected from the jury list as required by the Oklahoma Constitution to serve as a commissioner in this cause.

WHEREFORE, premises considered, the above named Defendants respectfully request that this Honorable Court dismiss this cause with prejudice as Plaintiff's actions herein have fragrantly [sic] ignored the constitutional and statutory procedure for this action as well as the rights of these Defendants and that this Honorable Court enter an order permanently enjoining the Plaintiff from making further entry or committing further trespass upon the lands of these defendants and for such other relief as the court deems appropriate.

/s/ Carl Michael Smith
Carl Michael Smith
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

Attorney for Defendants

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Motion to Dismiss with Prejudice and Request to Issue Permanent Injunction to Charles B. Crane, attorney at Law, P. O. box 201, Tulsa, Oklahoma, 74102, on this 20th day of February, 1974.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE DISTRICT COURT
OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Plaintiff
-vs-
MAXWELL DARKS
Defendant

No. C-73-94

MOTION TO DISMISS WITH PREJUDICE
AND REQUEST TO ISSUE
PERMANENT INJUNCTION

COMES NOW the Defendants, Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Williams, Robert M. Moran, Barbara M. Moran, Barbara M. Jernigan, and John E. Moran Trust and respectfully show the court as follows:

I

That the Plaintiff, Transok Pipeline Company, has wholly failed, neglected and refused to comply with its constitutional and statutory duties under the laws of the State of Oklahoma in the prosecution of the above styled action in the following particulars, to-wit:

1. That several months prior to the report of the commissioners in this cause, Plaintiff entered upon the property of Defendant Maxwell Darks and disturbed his possession thereof by rearranging the terrain, cutting cattle fences, *allowing the release of the Defendant Maxwell Darks cattle* and disturbing the proprietary rights of this Defendant by laying injection pipeline and preparing injection wells; all causing irrepairable [sic] damage to this Defendant without authority of law.

2. That although Plaintiff is required under the law

of the State of Oklahoma to submit to the commissioners information as to the quantity and boundaries of the property being condemned, they wholly failed to do so.

3. That although the commissioners had no knowledge as to the quantity of the property being condemned, they filed their report with the clerk of this court, as to an award of damages for this and other Defendants. That although the said report of the commissioners was filed herein on June 25, 1973, the Plaintiff has wholly failed to deposit the money assessed as damages to those Defendants in such a manner as to allow these Defendants to demand and obtain "immediate receipt" of same. That the damages awarded these Defendants were commingled with the damages of other defendants herein so as to render it impossible for the clerk to pay any individual defendant as shown by Defendant's Exhibits "A" and "B" attached hereto and made a part hereof. That this delivery by Plaintiff to the clerk was calculated to technically comply with the law of the State of Oklahoma but thereby deprive this and other defendants of the availability of these funds.

4. That under the constitution and statutes of the State of Oklahoma, payment of money to these Defendants is a MANDATORY CONDITION PRECEDENT to Plaintiff's right of entry and possession upon Defendants' property. Plaintiff's failure to take the necessary affirmative action as required by law, is, in effect, an abandonment of this lawsuit and places Plaintiff in the position of a mere "naked trespasser."

5. That the form of notice of the report of the commissioners has not been shown to be one approved by the Supreme Court of Oklahoma and having been prepared by the court administrator as required under Oklahoma law.

II

That one of the commissioners appointed by the court in this cause, to-wit: Binas Hostettler, is an attorney a member of the Oklahoma Bar Association, and is, therefore, not an eligible freeholder selected from the jury list as required by the Oklahoma Constitution to serve as a commissioner in this cause.

WHEREFORE, premises considered, the above named Defendants respectfully request that this Honorable Court dismiss this cause with prejudice as Plaintiff's actions herein have fragrantly [sic] ignored the constitutional and statutory procedure for this action as well as the rights of these Defendants and that this Honorable Court enter an order permanently enjoining the Plaintiff from making further entry or committing further trespass upon the lands of these defendants and for such other relief as the court deems appropriate.

/s/ Carl Michael Smith
Carl Michael Smith
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

Attorney for Defendants

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Motion to Dismiss with Prejudice and Request to Issue Permanent Injunction to Charles B. Crane, attorney at Law, P. O. box 201, Tulsa, Oklahoma, 74102, on this 20 day of February, 1974.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE DISTRICT COURT
OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Plaintiff
-vs-
BURT WININGER, SR., et al
Defendant

No. C-73-95

MOTION TO DISMISS WITH PREJUDICE
AND REQUEST TO ISSUE
PREMANENT INJUNCTION

COMES NOW the Defendants, Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Williams, Robert M. Moran, Barbara M. Moran, Barbara M. Jernigan, and John E. Moran Trust and respectfully show the court as follows:

I

That the Plaintiff, Transok Pipeline Company, has wholly failed, neglected and refused to comply with its constitutional and statutory duties under the laws of the State of Oklahoma in the prosecution of the above styled action in the following particulars, to-wit:

1. That several months prior to the report of the commissioners in this cause, Plaintiff entered upon the property of Defendant Maxwell Darks and disturbed his possession thereof by rearranging the terrain, cutting cattle fences, *allowing the release of the Defendant Maxwell Darks cattle* and disturbing the proprietary rights of this Defendant by laying injection pipeline and preparing injection wells; all causing irrepairable [sic] damage to this Defendant without authority of law.

2. That although Plaintiff is required under the law of the State of Oklahoma to submit to the commissioners information as to the quantity and boundaries of the property being condemned, they wholly failed to do so.

3. That although the commissioners had no knowledge as to the quantity of the property being condemned, they filed their report with the clerk of this court, as to an award of damages for this and other Defendants. That although the said report of the commissioners was filed herein on June 25, 1973, the Plaintiff has wholly failed to deposit the money assessed as damages to those Defendants in such a manner as to allow these Defendants to demand and obtain "immediate receipt" of same. That the damages awarded these Defendants were commingled with the damages of other defendants herein so as to render it impossible for the clerk to pay any individual defendant as shown by Defendant's Exhibits "A" and "B" attached hereto and made a part hereof. That this delivery by Plaintiff to the clerk was calculated to technically comply with the law of the State of Oklahoma but thereby deprive this and other defendants of the availability of these funds.

4. That under the constitution and statutes of the State of Oklahoma, payment of money to these Defendants is a MANDATORY CONDITION PRECEDENT to Plaintiff's right of entry and possession upon Defendants' property. Plaintiff's failure to take the necessary affirmative action as required by law, is, in effect, an abandonment of this lawsuit and places Plaintiff in the position of a mere "naked trespasser."

5. That the form of notice of the report of the commissioners has not been shown to be one approved by the Supreme Court of Oklahoma and having been pre-

pared by the court administrator as required under Oklahoma law.

II

That one of the commissioners appointed by the court in this cause, to-wit: Binas Hostettler, is an attorney a member of the Oklahoma Bar Association, and is, therefore, not an eligible freeholder selected from the jury list as required by the Oklahoma Constitution to serve as a commissioner in this cause.

WHEREFORE, premises considered, the above named Defendants respectfully request that this Honorable Court dismiss this cause with prejudice as Plaintiff's actions herein have fragrantly [sic] ignored the constitutional and statutory procedure for this action as well as the rights of these Defendants and that this Honorable Court enter an order permanently enjoining the Plaintiff from making further entry or committing further trespass upon the lands of these defendants and for such other relief as the court deems appropriate.

/s/ Carl Michael Smith
Carl Michael Smith
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

Attorney for Defendants

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Motion to Dismiss with Prejudice and Request to Issue Permanent Injunction to Charles B. Crane, attorney at Law, P. O. box 201, Tulsa, Oklahoma, 74102, on this 20th day of February, 1974.

/s/ Carl Michael Smith
Carl Michael Smith

IN THE DISTRICT COURT
OF HUGHES COUNTY
STATE OF OKLAHOMA

TRANSOK PIPE LINE COMPANY,
A Corporation
Plaintiff
-vs-
JOHN R. TURNER, et al
Defendant

No. C-73-100

MOTION TO DISMISS WITH PREJUDICE
AND REQUEST TO ISSUE
PERMANENT INJUNCTION

COMES NOW the Defendants, Maxwell Darks, North Central Oil Corporation, B. Broadrick, Mary Enod Williams, Robert M. Moran, Barbara M. Moran, Barbara M. Jernigan, and John E. Moran Trust and respectfully show the court as follows:

I

That the Plaintiff, Transok Pipeline Company, has wholly failed, neglected and refused to comply with its constitutional and statutory duties under the laws of the State of Oklahoma in the prosecution of the above styled action in the following particulars, to-wit:

1. That several months prior to the report of the commissioners in this cause, Plaintiff entered upon the property of Defendant Maxwell Darks and disturbed his possession thereof by rearranging the terrain, cutting cattle fences, *allowing the release of the Defendant Maxwell Darks cattle* and disturbing the proprietary rights of this Defendant by laying injection pipeline and preparing injection wells; all causing irrepairable [sic] damage to this Defendant without authority of law.

2. That although Plaintiff is required under the law of the State of Oklaoma to submit to the commissioners information as to the quantity and boundaries of the property being condemned, they wholly failed to do so.

3. That although the commissioners had no knowledge as to the quantity of the property being condemned, they filed their report with the clerk of this court, as to an award of damages for this and other Defendants. That although the said report of the commissioners was filed herein on June 25, 1973, the Plaintiff has wholly failed to deposit the money assessed as damages to those Defendants in such a manner as to allow these Defendants to demand and obtain "immediate receipt" of same. That the damages awarded these Defendants were commingled with the damages of other defendants herein so as to render it impossible for the clerk to pay any individual defendant as shown by Defendant's Exhibits "A" and "B" attached hereto and made a part hereof. That this delivery by Plaintiff to the clerk was calculated to technically comply with the law of the State of Oklahoma but thereby deprive this and other defendants of the availability of these funds.

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/s/ Carl Michael Smith
Carl Michael Smith
402 Oklahoma Mortgage Building
Oklahoma City, Oklahoma

Attorney for Defendants

CERTIFICATE OF MAILING

I, Carl Michael Smith, do hereby certify that I have mailed a true and correct copy of the above and foregoing Motion to Dismiss with Prejudice and Request to Issue Permanent Injunction to Charles B. Crane, attorney at Law, P. O. box 201, Tulsa, Oklahoma, 74102, on this 20th day of February, 1974.

/s/ Charles Michael Smith
Charles Michael Smith

FILED
SUPREME COURT
DEC 9 1975
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, December 9, 1975

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

47,595 Patsy Sue Shaffer Brady, Exec. of Estate of Susie Lavonne Shaffer v. Patsy Sue Shaffer Brady as Exec. of Estate of Richard D. Shaffer, deceased, et al.
Appeal dismissed with prejudice on motion of appellant.

47,917 Ray Eugene Timmerman v. Alice Mae Timmerman.
Appeal dismissed on motion of appellant.

47,935 Phillips Petroleum Co. v. Oklahoma Tax Commission.
Request for oral argument and petition for rehearing denied.

47,936 Kewanee Oil Co. v. Oklahoma Tax Commission.
Request for oral argument and petition for rehearing denied.

48,065 Larry Randall Oldham v. Drummond Board of Education of Independent School Dist. 1-85, et al.
Request for oral argument and petition for rehearing denied.

48,122 In the matter of the adoption of Regina Mae Jones, a minor child.
Certiorari denied.

48,245 First National Bank of Guymon, Okla. et al v. First National Bank and Trust Co. of Oklahoma City.
Appeal dismissed on motion of appellant.

48,705 Anco Oil Company, Inc. v. Mike Damasiewicz.
Appeal dismissed on joint motion of parties.

48,708 Transok Pipe Line Co. v. Frank Seay, Judge.
Oral argument and rehearing denied.

48,709 Transok Pipe Line Co. v. Frank Seay, Judge.
Oral argument and rehearing denied.

48,855 Rexall Realty Corp. v. Meridian Mall, Inc.
Appeal dismissed on motion of appellant.

48,323 Iron Masters, Inc. v. Bill Trindle, Bass Tamer, Inc. et al.
Appellant granted until January 8, 1976 to file brief.

48,383 James D. Swift and Felma J. Swift v. P. W. Hinton, et al.
Appellants granted until January 12, 1976 to file brief. No further extension contemplated.

48,586 First National Bk. & Tr. Co. of Okla. City v. Sanco Enterprises, Inc.; Sanco Finance, Inc.; Raymond R. Santilli, et al.
Appellant granted until January 8, 1976 to file brief.

48,650 Debbie S. Hyde v. Vernon D. Hyde.
Appellee granted until December 16, 1975 to file brief.

48,658 In the matter of the Est. of Joeanner Rushing, deceased.
Appellees granted until January 15, 1976 to file brief.

48,713 Bonnie J. Pool etc. Admin. of Estate of Frank R. Pool, Deceased v. Orval C. Motsinger and Bradley Mechanical Contractors, Inc.
Appellants granted until January 8, 1976 to file brief.

48,814 Melco Drilling Co., Inc. et al v. Elmer Roe Clark et al.
Petitioners granted until January 7, 1976 to file brief.

48,857 In the matter of the Estate of John Bishop, Deceased.
Time for completion of record extended to January 8, 1976.

48,927 Simone L. Munley v. ICS Financial House, Inc.
Appellant granted until January 8, 1976 to file brief.

Ralph B. Johnson
CHIEF JUSTICE

APPENDIX B

(1) U.S. CONST. amend. V, U.S.C.A. Const Amend. V, p. 4.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) U.S. CONST. amend. XIV, §1, U.S.C.A. Const. Amend. XIII-XIV, p. 33.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3) OKLA. CONST. art. 2 §24, 1 Okl. Stats. 1971 Official Ed., p. 65.

§ 24. Private property — Public use — Character of use a judicial question. — Private property shall not be taken or damaged for public use without just compensa-

tion. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

(4) 28 U.S.C. §1257(3), 28 U.S.C.A. §§1251-1291, p. 144.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the

Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

(5) 28 U.S.C. §2101, 28 U.S.C.A. §§1961-2240, pp. 85-86.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allottted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104.

(6) 52 O.S. 1971 §36.4, 2 Okl. Stats. 1971 Official Ed., p. 3073.

§ 36.4 Certificate of commission. — Any natural gas public utility desiring to exercise the right of eminent domain as to any property for use for underground storage of natural gas shall, as a condition precedent to the filing of its petition in the district court, obtain from the commission a certificate setting out findings of said commission (a) that the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; (b) the amount of recoverable oil and native gas, if any, remaining therein; provided, that the commission shall issue no such certificate until after public hearing is had on application, pursuant to

notice served in compliance with notice in civil actions in the district court, together with notice published at least once each week for two (2) successive weeks in some newspaper of general circulation in the county or counties where the gas is proposed to be stored, the first publication to be at least ten (10) days prior to the date of the hearing. Laws 1951, p. 135, § 4.

(7) 66 O.S. 1973 §53, OKLA. St. 1975 Supp., p. 773.

§ 53. Taking by eminent domain — Commissioners — Appointment and proceedings — Right to construct road. — If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated, shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three (3) disinterested freeholders, to be slected by said judge as commissioners, and who shall not be interested in a like question.

The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of this state or a resident of this state who has departed herefrom with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such notice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish legal notice in the county where the petition is filed, the ten-day period to begin with the first pub-

lication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued.

The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvements proposed; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded (without further acknowledgement or proof) in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of construction said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises. Amended by Laws 1973, c. 28, § 1, eff. Jan. 1, 1974.

(8) 66 O.S. 1971 §54, 3 Okl. Stats. 1971 Official Ed., p. 3988.

§ 54. Compensation, accrual of right to. — When possession is taken of property condemned, as provided

herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judical determination of the sufficiency or insufficiency of said compensation. R.L.1910, § 1401.

(9) 66 O.S. 1971 §55, 3 Okl. Stats. 1971 Official Ed., p. 3988.

§ 55. Review of commissioners' report — Jury trial — Notice. — (A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed,' the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this Section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall be distributed to all clerks of the district court by said Court Administrator. If a

party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception or demand for jury trial to the last known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notice, as defined in 25 O.S.Supp.1969, § 106. After issuing the notices provided herein, the court clerk shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this Section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this Section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed (20) days from the date the application is heard. R.L.1910, § 1402; Laws 1961, p. 497, § 1; Laws 1970, c. 322, § 1. Eff. Jan. 1, 1971.

(10) 66 O.S. 1971 §57, 3 Okl. Stats. 1971 Official Ed., p. 3989.

§ 57. Provisions applicable to all corporations and to state — Proceedings by state — Determination of character of use — Assessment of damages when land taken without condemnation. — The provisions of this article[1] with reference to eminent domain shall apply to all corporations having the right to eminent domain, and shall apply to the State of Oklahoma and its various educational, reformatory, penal and eleemosynary institutions, including departments of state having the power to purchase real property for public purposes, and such

institutions and departments shall have the right under this article to acquire fee simple title to the property taken. When the State of Oklahoma through the managing board or commission of the institution or department of state concerned is unable to purchase any real property needed for any such institution or department, condemnation proceedings to take the same and to pay damages therefor may be instituted in the name of the State of Oklahoma by the managing board or commission of the institution or department of state involved; and all such institutions and corporations shall have the right, under the provisions of this article, to acquire right of way over, under, along or across the property or right of way of any other such corporation, not inconsistent with the purposes for which such property was taken or acquired. In all cases of condemnation of property for either public or private use, the determination of the character of the use shall be a judicial question; and the procedure shall be as provided herein: Provided, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings. R.L. 1910, § 1404; Laws 1929, c. 24, p. 20, § 1.

(11) U.S. Supreme Court Rule 19(1)(a), 28 U.S.C.A. RULES, 1975 P.P., 14.

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling

nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

RESPONDENT'S CERTIFICATE OF SERVICE

I, Kenneth W. East, hereby certify that I deposited in the United State Post Office in Tulsa, Oklahoma, three printed copies of this Brief in Opposition, and mailed same, by First Class Air Mail, postage prepaid, on the 2nd day of April, 1976, to each of the following parties at their Post Office addresses:

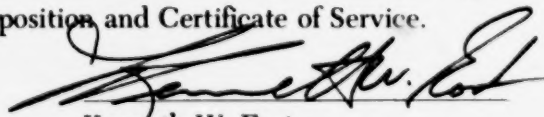
H. Maxwell Darks, Petitioner
313 S.W. 103rd St.
Oklahoma City, Oklahoma 73139

Maxwell Darks and Les Starks d/b/a Greasy Creek Cattle Company, Petitioner
c/o H. Maxwell Darks
313 S.W. 103rd St.
Oklahoma City, Oklahoma 73139

Thomas S. Kleppe, Secretary of Interior, Respondent
United States Department of Interior
19th and C Street, N.
Washington, D. C. 20240

Solicitor General
Department of Justice
Washington, D. C. 20530

I further certify that all of the parties required to be served in respect to this cause have been served as stated above, and also certify that my appearance in this Court in respect of this cause accompanies the filing of this Brief in Opposition and Certificate of Service.



Kenneth W. East